No. 76-841

# In the
# Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF ILLINOIS;
Clark County, Illinois;
Crawford County, Illinois;
Lawrence County, Illinois;
Wabash County, Illinois;
City of Robinson, Illinois;
City of Mount Carmel, Illinois;
Greater Wabash Regional
Planning Commission,
*Petitioners,*

v.

CONSOLIDATED RAIL CORPORATION,
*Respondent.*

Supreme Court, U. S.
FILED
DEC 18 1976
MICHAEL RODAK, JR., CLERK

## PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT REGIONAL RAIL REORGANIZATION ACT OF 1973

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# INDEX


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 3 |
| STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. The Special Court Exceeded the Carefully Defined Limits of Its Jurisdiction | 9 |
| II. The District Court Decision Was Entitled to *Res Judicata* Effect in the Special Court | 15 |
| III. The Special Court Improperly Applied the Standards for a Preliminary Injunction | 18 |
| CONCLUSION | 23 |
| Appendix A (Statutes) | 1a |
| Appendix B (Opinion of the Special Court) | 12a |
| Appendix C (Findings of Fact and Conclusions of Law of the District Court) | 35a |
| Appendix D (Permanent Injunction of the District Court) | 49a |


## CITATIONS

CASES:


| | |
|---|---|
| *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 419 U.S. 215 (1974) | 3 |
| *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940) | 15 |

PAGE

*Construction Laborers' Local No. 438* v. *Curry*, 371 U.S. 542 (1963) ..... 2-3

*Durfee* v. *Duke*, 375 U.S. 106 (1963) .....15, 18

*Kalb* v. *Feuerstein*, 308 U.S. 433 (1940) ..... 17

*Norwich & Worcester Railroad Co.* v. *United States*, 408 F.Supp. 1398 (1976) ..... 13

*Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) ..... 3

*Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) ..... 4

*Schuler* v. *Patton*, 416 F.Supp. 1252 (1976) .....12, 13

*Stoll* v. *Gottlieb*, 305 U.S. 165 (1938) .....15, 17

*Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939) ..... 15

*Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958) ..... 18

MISCELLANEOUS:

Wright & Miller, *Federal Practice and Procedure: Civil* §2948 ..... 21

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---

Petitioners (hereafter the "State of Illinois") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Special Court, Regional Rail Reorganization Act of 1973, entered in this proceeding on November 29, 1976.

### OPINIONS BELOW

The opinion of the Special Court, not yet reported, appears in Appendix B hereto. The Findings of Fact and

Conclusions of Law of the United States District Court for the Eastern District of Illinois made for the issuance of a temporary restraining order in the related matter of *State of Illinois* v. *Consolidated Rail Corporation,* No. 76-2-042 (E.D. Ill.), appear in Appendix C hereto, and the Permanent Injunction issued by the District Court appears in Appendix D hereto.

## JURISDICTION

The jurisdiction of the Supreme Court to review the decision of the Special Court is conferred by Section 209(e)(3) of the Regional Rail Reorganization Act of 1973 (hereafter cited as the "1973 Rail Act"), as amended by Section 602(b) of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereafter cited as the "1976 Rail Act"), which provides as follows:

> "A final order or judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this chapter, in whole or in part, or of any action taken under this Act, shall be reviewable by direct appeal to the Supreme Court of the United States in the same manner that an injunctive order may be appealed under section 1253 of Title 28, United States Code. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment."

The Special Court's decision was based upon its claim of jurisdiction under Section 209(e)(1)(C) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act, and is a final order of that Court. *Construction*



*Laborers' Local No. 438* v. *Curry,* 371 U.S. 542, 550-551 (1963); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 418 n.* (1971); *American Radio Ass'n* v. *Mobile Steamship Ass'n,* 419 U.S. 215, 217 n.1 (1974).

## QUESTIONS PRESENTED

1. Did the Special Court violate the limits of its jurisdiction under Section 209(e)(1)(C) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act, and thereby unjustifiably contravene a decision of the United States District Court, disrupt proceedings before the Court of Appeals for the Seventh Circuit, and encroach upon the authority of the Interstate Commerce Commission?

2. Was the holding of the District Court that it had jurisdiction of the matter and that ConRail could not use the L & N trackage without prior ICC approval *res judicata* in the Special Court and subject to review only in the Court of Appeals?

3. Did the Special Court err in issuing a preliminary injunction on the basis of conclusions reached without evidence, which directly conflicted with the findings of the District Court, based upon a full evidentiary record, that irreparable damage would result to the State of Illinois and the other petitioners if the status quo were disturbed?

## STATUTORY PROVISIONS INVOLVED

Because of their length, the statutory provisions involved in this matter have been printed in Appendix A hereto.

## STATEMENT OF THE CASE

This case raises important questions relating to the jurisdictional limits of the Special Court under the 1973 Rail Act, as amended by the 1976 Rail Act (App. 1a-7a). Basically, these Acts provide for a federally financed reorganization of the Penn Central Railroad and six other bankrupt railroads. The Rail Acts apply to operations in the seventeen states in the Northeastern and Midwestern sections of the nation.[1]

The United States Railway Association (USRA) was created by the 1973 Rail Act to develop a Final System Plan (FSP), which became effective on November 9, 1975. The FSP designated the properties of the bankrupt carriers which would be transferred to ConRail, a private not-for-profit corporation established under authority of the 1973 Rail Act and incorporated under Pennsylvania law, or to other solvent carriers. The FSP also designated the rail properties of profitable railroads which could be acquired by ConRail.

Under the FSP, if ConRail were to acquire rail properties or rights to operate over the tracks of a solvent line, it was required by Section 206(d)(4) of the 1973 Rail Act, as amended, to enter into a final agreement with that line within a 95-day period after the effective date of the FSP. ConRail and the solvent railroad also were required by Section 508(b) of the 1973 Rail Act, as amended, to obtain labor protective agreements with the representatives of the railroad's employees as a precondition to their authority to enter into the trackage

[1] This Court reviewed the constitutionality of portions of the 1973 Rail Act in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 108-117 (1974), and summarized its structure and objectives.



agreement. If the trackage agreement was finally executed within the statutorily prescribed time limits and met the labor protection conditions, the transfer of property or operating rights of a profitable railroad took place without any action of the Interstate Commerce Commission (ICC). But if those limits or conditions were not met, the agreement to transfer property or trackage rights became subject to prior ICC approval under 49 U.S.C. §1, par. (18) and §5, par. (2).

Prior to April 1, 1976, ConRail operated freight trains on Penn Central track wholly within Illinois between Cairo and Danville. Many of these shipments were of coal from southern Illinois through to Chicago. The FSP, however, excluded a portion of this route and provided that ConRail could secure and use trackage rights through Indiana from the Louisville and Nashville Railroad Company (L & N), a solvent carrier, in lieu of the excluded portion of the Penn Central track.[2] The FSP also stated that the excluded portion would be designated to ConRail, however, if the L & N trackage rights were not secured. On April 1, 1976, ConRail began diverting freight shipments from the Penn Central line in Illinois to the L & N trackage through Indiana.

The State of Illinois, therefore, filed an action against ConRail in the United States District Court for the Eastern District of Illinois. The District Court held that it had jurisdiction over the matter[3] and that the case

[2] The L & N trackage was only one of several alternative routes which the FSP designated for possible acquisition by ConRail. Final System Plan, Vol. I, at pp. 333-334.

[3] It based its jurisdiction on 28 U.S.C. §§1331, 1332, 1337, 1391 and 1651, and also on 49 U.S.C. §1, par. (18) and §5, par. (2).

did not fall within the grant of exclusive jurisdiction to the Special Court.

The basic dispute in this litigation was whether ConRail secured the trackage rights from the L & N within the time limits and labor protective provisions of the 1973 Rail Act and the 1976 Rail Act. Those Acts provided that the designation of the solvent railroad properties or trackage rights to ConRail would terminate 95 days from November 9, 1975—the effective date of the FSP—unless prior to that date the necessary agreements were concluded. The District Court concluded, after taking evidence, that the ConRail-L & N trackage agreement was not executed before the statutory deadline of midnight, February 11, 1976. The District Court further held that the necessary labor protective agreements had not been concluded before the statutory deadline and that the agreement was not binding since ConRail had the option whether to effectuate it until January 1, 1977. (App. 42a-43a).[4]

The District Court also found that the State of Illinois would be irreparably injured without injunctive relief from the ConRail diversion, whereas ConRail would not suffer irreparable harm from such relief. The State of Illinois had entered into an operating agreement with ConRail on March 29, 1976, which provided for rail operations by ConRail over the portion of the Penn Central line excluded from the FSP. Illinois was to subsidize ConRail for the amount by which the costs of those operations exceeded the revenues obtained, but Illinois would receive

[4] The District Court also noted that ConRail and L & N were "not even operating pursuant to the purported agreements but in fact have varied the agreements subsequent to their execution." The District Court found that ConRail's operations were violating the routing restrictions specified in the agreements. (App. 43a).



all profits gained from the operations. In addition, the State of Illinois formulated a State Rail Plan as authorized by Title IV of the 1973 Rail Act. Under that Plan, which was approved by the Federal Railroad Administration and the Illinois General Assembly, the State undertook to rehabilitate the track of the excluded portion. Any profits gained from the ConRail operations over the track could be used for rehabilitation. The diversion of traffic by ConRail would thus increase Illinois' subsidies to ConRail, eliminate any chance of profits accruing to Illinois, and reduce the funds available for rehabilitation.[5] The District Court therefore enjoined ConRail from diverting freight over the L & N trackage without the prior ICC approval required by statute. (App. 49a).

ConRail filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit, but did not seek a stay of the District Court's injunction.

ConRail and L & N then published a joint tariff permitting ConRail coal trains to operate over the L & N trackage. The State of Illinois notified the ICC of its opposition. Although the ICC did not suspend the tariff, it did begin an investigation of the matter. The tariff became effective on August 31, 1976, but will expire on December 31, 1976.

On September 1, 1976, the State of Illinois served ConRail with notice of an arbitration proceeding under the provisions of the ConRail-Illinois agreement on the

[5] The District Court found that the other petitioners—counties and cities through which the excluded portion passes—would also suffer from the diversion by losing tax revenues resulting from the operations and from the general decline of business activity along the line. (App. 46a).

question whether the diversion of traffic violated that agreement.

Instead of pursuing its appeal in the Seventh Circuit, ConRail filed a complaint in the Special Court. It sought a declaratory judgment that the ConRail-L & N trackage agreement had been executed within the time limits of the 1973 Rail Act, as amended, and an injunction preventing petitioners from seeking to enforce the District Court injunction and from litigating the disputed matters in any other forum, including arbitration.

The Special Court granted the relief sought. It asserted exclusive jurisdiction over the questions presented on the grounds that the failure of ConRail to secure in a timely manner the trackage rights designated in the FSP from L & N would trigger a ministerial duty on the part of the USRA to designate the excluded portion of the Penn Central line to ConRail. (App. 19a). The Special Court refused to give the District Court decision *res judicata* effect and held that, under its interpretation of the statutory time limits for the trackage agreement, the ConRail-L & N agreement had been timely.[6] It issued the preliminary injunction sought by ConRail on the grounds that ConRail appeared likely to succeed on the merits, that the State of Illinois had suffered only the financial harm that was contemplated by the FSP originally, and that denial of injunctive relief would "frustrate" ConRail's efforts to improve the efficiency of railroad operations.

[6] The determination by the Special Court constitutes a final resolution of the issues that were presented by ConRail's complaint.



## REASONS FOR GRANTING THE WRIT

### I. The Special Court Exceeded the Carefully Defined Limits of Its Jurisdiction.

In enacting the 1973 and 1976 Rail Acts, Congress explicitly confined jurisdiction of the Special Court to certain "central functions" and recognized the authority of the federal courts to resolve issues involving the effect of the Rail Acts upon other laws that govern railroad operations. Previous drafts of legislation had given broad exclusive jurisdiction to the Special Court. Under the bills originally proposed in the Senate and House, the Special Court would have had exclusive jurisdiction over the matters raised in this litigation.[7] But these bills were not enacted into law. Instead, Congress limited the Special Court's exclusive jurisdiction to six categories of civil

[7] The Senate bill drafted in 1975 defined exclusive Special Court jurisdiction as follows:

> "(e) Civil Actions—(1) Notwithstanding any other provision of law, any action—
>
> (A) for injunctive or other relief from the enforcement, operation, or execution of [the] Act or any provision thereof, or from any action taken pursuant to authority purportedly conferred under this Act;
>
> (B) challenging . . . the illegality of any action or any failure to take action pursuant to authority conferred or purportedly conferred under this Act;
>
> (C) to enforce or declare any rights under this Act;
>
> • • •
>
> shall be within the original and exclusive jurisdiction of the special court." S.2718, 94th Cong., 1st Sess., §602(b).

*See also* S.Rep.No. 499, 94th Cong., 1st Sess. 83 (1976). The House bill similarly conferred broad jurisdiction on the Special Court. H.R. 10979, 94th Cong., 1st Sess., §910(h).

actions. *See* Section 209(e)(1) of the 1973 Rail Act, as amended by Section 602(b) of the Rail Act[8] The Conference Report unambiguously states the Congressional purpose to restrict Special Court jurisdiction to certain "central functions" under the Acts:

> "The conference substitute eliminates the provision giving the special court exclusive jurisdiction over any action to enforce or declare rights under the Rail Act of 1973. Many actions covered by this provision undoubtedly would be within the exclusive jurisdiction of the special court under other provisions of this bill, but still others may be of no concern to the central functions of the special court under the Rail Act of 1973, as amended." S. Rep. No. 94-595, 94th Cong., 2d Sess. 188 (1976).

[8] Notwithstanding any other provision of law, any civil action—

(A) for injunctive or other relief against the Association from the enforcement, operation, or execution of this chapter or any provision thereof, or from any action taken by the Association pursuant to authority conferred or purportedly conferred under this chapter;

(B) challenging the constitutionality of this chapter or any provision thereof;

(C) challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this chapter;

(D) to obtain, inspect, copy, or review any document in the possession or control of the Association that would be discoverable in litigation pursuant to section 743(c) of this title;

(E) brought after a conveyance, pursuant to section 743(b) of this title, to set aside or annul such conveyance or to secure in any way the reconveyance of any rail properties so conveyed; or

(F) with respect to continuing reorganization and supplemental transactions, in accordance with section 745 of this title;

shall be within the original and exclusive jurisdiction of the special court."



The Special Court concluded that this action fell under Section 209(e)(1)(C) of the 1973 Rail Act as one "challenging the legality of any action of the Association [USRA], or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this chapter . . . ."

The Special Court acknowledged that the State of Illinois had not expressly or directlly challenged the USRA in any manner:

> "USRA did not, in terms, require ConRail and L & N to conclude an agreement, nor was the original designation by USRA of L & N trackage challenged. In addition, the Illinois-ConRail Operating Agreement was not negotiated by USRA, nor does the interpretation of the agreement directly involve USRA." (App. 19a).

Nonetheless, the Special Court asserted jurisdiction on the ground that the State of Illinois had implicitly challenged the failure of the USRA to certify the excluded portion of the Penn Central line for conveyance to ConRail in the event that ConRail and L & N had failed to execute a timely trackage agreement.[9]

The Special Court's jurisdictional holding rests on a complete mischaracterization of the position taken by the State of Illinois and a misinterpretation of the relevant provisions of the 1973 Rail Act, as amended. The State

[9] With a similar lack of justification, the Special Court found an implicit challenge to the failure of USRA to designate the excluded portion for conveyance to ConRail under Section 208(d) of the 1973 Rail Act, as amended, which provides for designations supplemental to the FSP. (App. 19a-20a).

of Illinois contended that the untimeliness of the ConRail-L & N trackage agreement removed its exemption from ICC review. If that contention prevailed, the next step would *not* be USRA conveyance of the excluded portion of the Penn Central line to ConRail, but submission of the ConRail-L & N proposal to the ICC for its approval, under 49 U.S.C. §1, par. (18) and §5, par. (2).

By submitting its proposal to the ICC, ConRail could still obtain the L & N trackage rights, and as a result, the USRA would not have to convey the excluded portion to ConRail under the FSP.[10] The State of Illinois plans to challenge the proposal before the ICC on the grounds that the public interest and convenience would be best served by ConRail operation over the Penn Central line. If that challenge were successful, ConRail would not be permitted to use the L & N trackage and would continue to use the excluded portion of the Penn Central line. ConRail would then have various alternatives. It could continue such operations under its subsidy agreement with the State of Illinois. It could purchase the excluded portion from the Penn Central trustees. It also could seek a supplemental designation of the excluded portion by the USRA under Section 208(d) of the 1973 Rail Act, as amended.[11] Under

[10] In fact, ConRail recognized this possibility by filing a joint tariff before the ICC, and the ICC is now investigating the matter. *See* ICC Docket No. 36420, Joint-Line Routing on Coal, CR and LN RR's.

[11] The statement in the FSP, quoted by the Special Court, that the excluded portion would be conveyed to ConRail if the L & N trackage rights were not obtained, has no basis in the Rail Acts or other legal authority. It was not a designation. The Special Court in a prior decision itself recognized that USRA statements in the FSP which were not designations had no binding effect. *Schuler* v. *Patton,* 416 F. Supp. 1252, 1255-1256 (1976).



none of these alternatives would action by the USRA or its failure to act be subject to legal challenge by the State of Illinois, nor would there be any other basis for a future challenge of the USRA if the District Court decision were upheld.

The USRA itself recognized the basis for the District Court's jurisdiction. In its Statement of Position filed in the District Court in conjunction with its motion for leave to appear as *amicus curiae,* the USRA stated its view that if the District Court found the ConRail-L & N agreement to be timely, the District Court had no jurisdiction to proceed any further with the case. It expressly took no position on the timeliness question itself. Thus it necessarily agreed that the District Court had jurisdiction to issue its injunction based upon its finding of untimeliness. (Statement of Position of the United States Railway Association, dated June 9, 1976, at pp. 1, 3).

Since this action clearly falls outside the jurisdiction claimed by the Special Court, that Court intruded upon questions which Congress after full consideration deemed better left for resolution by the regular federal courts.[12]

[12] In two prior cases in which the Special Court took jurisdiction, the actions involved direct challenges to USRA designations in the FSP. *See Schuler* v. *Patton,* 416 F. Supp. 1252 (1976); *Norwich & Worcester Railroad Co.* v. *United States,* 408 F. Supp. 1398 (1976).

The Special Court did not pass on contentions that it had jurisdiction under Section 209(b) of the 1973 Rail Act, as amended, or Section 209(e)(2). Neither of these sections, however, confers jurisdiction on the Special Court. Section 209(b) provides jurisdiction for all proceedings with respect to the FSP, which has not been challenged, while Section 209(e)(2) provides exclusive jurisdiction for actions seeking interpretation, alteration, or implementation of any prior orders of the Special Court conveying rail properties to ConRail. The State of Illinois has not sought any action with respect to such prior orders.

That legislative judgment is fully supported by the need to reserve the limited time and resources of the Special Court to the complex questions arising from the basic functions and purposes of the 1973 and 1976 Rail Acts. It is also consistent with the need to protect the normal jurisdiction and functions of the other federal courts.

The Special Court's unwarranted exercise of jurisdiction also caused it to usurp the authority and role of the ICC under the Rail Acts. Congress determined that basic alterations of the railroad structure of the seventeen-state region under the Rail Acts would be largely exempt from ICC jurisdiction. However, the ICC was not removed entirely from the legislative program for reorganization of the railroads. Section 206(d)(4) of the 1973 Rail Act, as amended, represents one instance of continued ICC responsibility. Congress clearly limited the exemption from ICC review of the transfer of property or operating rights from solvent railroads to ConRail to the 95-day period in which voluntary agreements to that effect could be concluded. If the conditions for exemption were not met, the ICC was given authority to review the proposals and to determine whether the use of new routes would be consistent with the public interest.

Congress could have—but did not—create the Special Court as the only forum for resolution of disputes under the 1973 and 1976 Rail Acts and for judgments as to how proposed changes in railroad operations affect public convenience and necessity. The Special Court's decision below thus conflicts with that congressional allocation of authority and responsibility.[13]

[13] The Special Court, by enjoining the resolution of this matter under the arbitration provisions of the ConRail-Illinois operating agreement, also necessarily precluded future private resolution of any question involving the Rail Acts.



As a result of the Special Court's expansive view of its jurisdiction, all actions involving the Rail Acts would have to be brought in the Special Court, thus increasing its workload and also that of this Court, since there is no intermediate court of appeal to review the Special Court's decisions.

This case requires delineation of the line separating exclusive Special Court jurisdiction from that of the other federal courts and the ICC. A decision in this case would give guidance to the Special Court and to future litigants as to the limits of the Special Court's authority and competence. Unnecessary and time-consuming jurisdictional litigation would thus be avoided, and the potential for unseemly conflicts between the Special Court and the other federal courts would be eliminated.

## II. The District Court Decision Was Entitled to Res Judicata Effect in the Special Court.

The Special Court ruled that its exclusive jurisdiction over this case empowered it to refuse to give the decision of the District Court any *res judicata* effect. The State of Illinois submits that the Special Court had no authority to permit such collateral attack upon the District Court's jurisdiction.

The Special Court recognized that the jurisdictional question had been fully litigated in the District Court and that such jurisdictional decisions are entitled to *res judicata* effect. *See Stoll* v. *Gottlieb*, 305 U.S. 165, 171-172 (1938); *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66, 75-78 (1939); *Chicot Company Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 376-378 (1940). *Cf. Durfee* v. *Duke*, 375 U.S. 106 (1963). But the Special Court concluded that Congress intended its grant of exclusive jurisdiction to

void any judgment inconsistent with that jurisdiction. It cited as support for its view Secton 209(g) of the 1973 Rail Act as amended by Section 602(b) of the 1976 Rail Act, which provides that the Special Court may stay or enjoin any action or proceeding in any state court or federal court other than the Supreme Court if that action is contrary to any provision of the Rail Acts, impairs the effective implementation of the Rail Acts, or interferes with an order of the Special Court. The Court made a general conclusory finding that this litigation was impairing the implementation of the USRA's efforts by delaying them indefinitely.

If the Special Court does not have exclusive jurisdiction of this cause, as the State of Illinois contends, the District Court decision must stand unless modified by the Court of Appeals. But even assuming that the Special Court were to have exclusive jurisdiction, it still does not have the authority to upset the District Court decision.

The Rail Acts nowhere provide or imply that decisions of other federal courts are not to be given normal *res judicata* effect in the Special Court. Section 209(g) gives the Special Court power to stay or enjoin other proceedings, but that power is constrained by specific standards which must be met before such action can be taken. The Conference Report on the 1976 Rail Act explains that this section "made explicit the power of the special court as it relates to the stay of proceedings in other courts that would have an adverse effect on the reorganization process." S. Rep. No. 94-595, 94th Cong., 2d Sess. 187-188 (1976).

The power of the Special Court to disturb proceedings in other courts was carefully limited by Congress. Before the *res judicata* effect of jurisdictional decisions by



other courts can be overcome, the Special Court must make findings based on an evidentiary record of specific adverse consequences to the reorganization process. The Special Court did not—and could not—do so in this case, since the decision of the District Court was a reasonable one; submission of this localized matter to the ICC could have no adverse effect on the reorganization process.

The belated nature of ConRail's collateral attack upon the District Court's determination belies its asserted concern for the reorganization process. Immediately after the State of Illinois filed its complaint in the District Court, ConRail could have sought Special Court action on the jurisdictional issue. It did not do so. Instead, it argued the matter and lost, and then sought review in the Court of Appeals. Only at that point—five months after the beginning of this litigation—did it seek Special Court intervention. ConRail should properly be held to the forum in which it decided to argue the matter and to appellate review from that decision.

The Special Court's claimed power to nullify any decision of any lower federal court which, in its expansive view, touches upon its exclusive jurisdiction, runs counter to the legislative history of the Rail Acts and principles of federal law clearly established by decisions of this Court. *See Stoll* v. *Gottlieb*, 305 U.S., at 171-172. This extraordinary assertion of jurisdiction should be immediately curtailed by this Court.[14]

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[14] The Special Court's reliance upon *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), reveals the breadth of its claim. In *Kalb*, this Court found that the legislation involved was intended to divest courts other than the bankruptcy court of any jurisdiction over the matters in question. In this case, however, the legislative history discloses a careful effort to restrict Special Court jurisdiction to specific

### III. The Special Court Improperly Applied the Standards for a Preliminary Injunction.

The Special Court gave lip service to the traditional standards for the awarding of injunctive relief: probability of success on the merits, irreparable injury, the balance of harm to the parties, and the public interest. *See Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958). The Special Court, however, misapplied the standards in this case to such a degree that this Court's supervision and reversal for abuse of discretion is necessary.

*Probable Success on the Merits.* The Special Court strained the ordinary meaning of the language in Section 206(d)(4) to reach a desired result. That language specifies that the designation and authorization of the FSP for transfer of properties of profitable railroads to ConRail "shall terminate 95 days after the effective date of the final system plan unless, *prior to such date*, a binding agreement with respect to such properties has been entered into and concluded" (emphasis supplied). Even accepting the Special Court's adoption of the computation method of the Federal Rules of Civil Procedure, which would make February 12, 1976, the date upon which the designation would expire, the agreement was untimely. The statute plainly reads that the necessary agreement had to be fully binding *prior to such date*, that is, before February 12, 1976. The Special Court's conclusion that "prior to such date" means "prior to midnight on that date" flies

[14] (Continued)
types of actions. Moreover, as Justice Stewart observed in his opinion for the Court in *Durfee* v. *Duke*, 375 U.S. 106, 114 n. 12 (1963), the jurisdictional issue in *Kalb* had not actually been litigated in the first forum.



in the face of the language actually used (and conflicts with ConRail's own position that the deadline was midnight, February 11).[15] If Congress intended that result, it would have used the necessary language. Moreover, the District Court specifically found that the necessary labor agreements for exemption from ICC review had not been concluded by ConRail prior to executing the trackage rights agreement as required by the Rail Acts. (App. 42a); and that the agreement was not "binding" since ConRail retained an option not to effectuate the agreement up to January 1, 1977. (App. 43a).[16]

*Irreparable Injury and Balance of Hardships.* The Special Court noted that under special tariffs filed by ConRail and L & N effective August 31, 1976, the operations over the L & N route could continue until December 31, 1976, and that the ICC might approve a tariff extending beyond that date. It found irreparable injury, however, in its conclusion that denial of relief would frustrate ConRail's statutory task of improving the efficiency of railroad operations and the public interest in achieving an efficient, viable transportation service.

ConRail, however, introduced no evidence to support these general conclusions. The Special Court made no attempt to ascertain whether the possible delay in using the L & N track during ICC proceedings or ultimate ICC disapproval of the operations would frustrate the basic

[15] *See, e.g.*, Memorandum of Consolidated Rail Corporation in Support of Its Motion for a Preliminary Injunction (filed in the Special Court), at p. 13.

[16] The Special Court erroneously stated in its opinion that the parties agreed that all necessary labor protective agreements had been executed as of February 12, 1976.

objectives of the legislation. The Special Court merely adopted the general, conclusory arguments in ConRail's briefs about the injury that would result.[17] ConRail's view of "irreparable injury" is unique:

> "Conrail's statutory mandate is undermined each day that Conrail is unable to provide rail service over the L & N via trackage rights as contemplated by the FSP. Such harm is not capable of measurement, and cannot be compensated by damages. Moreover, to the extent that Conrail's operations pursuant to the FSP represent public interest planning by USRA and affirmative congressional approval, any deviation from the provision of rail service contemplated by the Final System Plan and approved by the Congress does continuing harm both to Conrail and to the public interest." Memorandum of Consolidated Rail Corporation in Support of Its Motion for a Preliminary Injunction, at p. 18.

The Special Court simply adopted ConRail's bald assertion that any delay in implementing ConRail's interpretation of the law causes irreparable harm to the public in-

[17] The Special Court stressed the FSP's conclusion that the track of the excluded portion was in poor condition and would require rehabilitation by ConRail at great expense if conveyed to ConRail. The drafting of the FSP was completed in July, 1975, and since then significant developments on this matter occurred which were ignored by the Special Court, although not by the District Court. The State of Illinois adopted a State Rail Plan providing for the rehabilitation of the track, and the ConRail-Illinois agreement provides for satisfactory rehabilitation through State subsidies. Expert testimony in the District Court indicated that rehabilitation could be completed within one year. (Testimony of Glenn L. Downing, Transcript of Proceedings of July 8, 1976, at p. 96). If the ConRail traffic were not diverted, Illinois could apply resulting profits to its rehabilitation program.



terest.[18] But this litigation concerns the propriety of that interpretation of the FSP and the Rail Acts. If the ConRail-L & N agreement was not timely, Congress has provided that it cannot be implemented without prior ICC approval. The public interest will be best protected by a correct construction and application of that congressional mandate, however ConRail may view the outcome.

In contrast to the Special Court's speculation, the District Court's decision rested on an extensive evidentiary record which revealed the actual monetary loss to the State of Illinois from the diversion and a lack of harm to ConRail from enjoining the diversion. Glenn L. Downing, a transportation and economic consultant (who testified as an expert witness in the District Court), submitted an affidavit in the Special Court stating that ConRail operations over the Penn Central line would be *less* expensive than operations over the L & N track:

> "I have also calculated the costs incurred by ConRail in its operation over the Cairo line and those which would be incurred in its operation using trackage rights over the L & N line. These calculations include consideration of the fewer crews, the trackage rights charge, the greater locomotive requirements and the higher average speed of the L & N line in comparison to the Cairo line. Conrail's costs on the L & N line would be over $100 per day more than the costs over the Cairo line even after consideration of the net revenues credited to Illinois in accordance with the Conrail/Illinois contract." Affidavit of Glenn

[18] However, as stressed in Wright & Miller, *Federal Practice and Procedure: Civil* §2948, at pp. 436-437:

> There must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.

L. Downing, attached to the Memorandum of the State of Illinois in Opposition to Motion of Conrail for Preliminary Injunction.

This evidence refutes any claim of irreparable injury by ConRail from using the Penn Central track during the pendency of the litigation or until ICC consideration of ConRail's proposal to use the L & N track. ConRail did not contradict this evidence, and the Special Court ignored it in its opinion.

Downing also estimated the net loss in revenue to the State of Illinois from the diversion of traffic to be more than $1000 per day. Based on evidence submitted by the other petitioners, the District Court found irreparable loss to them from the diversion. The Special Court's comment that the damage to the State of Illinois would be merely that contemplated by the FSP begs the question whether the FSP and the Rail Acts were being lawfully followed. The fact that the losses might have also resulted from lawful action does not make them any less irreparable if resulting from violations of the law. The balance of hardships clearly favors relief to the State of Illinois.

The Special Court's issuance of the preliminary injunction was a glaring abuse of discretion. Even more importantly, the Special Court appears to have read the Rail Acts as creating a favored status in the courts for ConRail and exempting it from the traditional requirements for securing injunctive relief. Only this Court can correct that misconstruction of federal law.



## CONCLUSION

The State of Illinois asks the Supreme Court to accept for plenary review the foregoing questions that fundamentally affect the implementation of the railroad reorganization program and the administration of the federal judicial system, and to reverse the decision of the Special Court.

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DATED: December 17, 1976

# APPENDIX A

## Statutes

Section 206(d)(4) of the Regional Rail Reorganization Act of 1973 (1973 Rail Act), as amended by Section 607(o) of the Railroad Revitalization and Regulatory Reform Act of 1976 (1976 Rail Act) [45 U.S.C.A. §716(d)(4)]:

> (4) Where the final system plan designates specified rail properties of a railroad in reorganization in the region, or of a railroad leased, operated, or controlled by a railroad in reorganization in the region, to be offered for sale to and operated by a profitable railroad operating in the region, such designation shall terminate 7 days after February 5, 1976, unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such offer. Any such offer may be modified until the date of acceptance thereof, unless such modification results in an offer for the sale of rail properties at less than the net liquidation value thereof. Where the final system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation or to other profitable railroads operating in the region, such designation and authorization shall terminate 95 days after the effective date of the final system plan unless, prior to such date, a binding agreement with respect to such properties has been entered into and concluded.

Section 208(d) of the 1973 Rail Act, as amended by Section 601(e) of the 1976 Rail Act [45 U.S.C.A. §718(d)]:

> (d) *Additions.* — (1) The supplemental report, dated September 18, 1975, to the final system plan, and the provisions of the Association's official errata

supplement to the final system plan, dated December 1, 1975, including all designations made therein, shall be treated for all purposes as if they had been part of and included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall, for all purposes, be deemed to be approved as modified and amended by such supplemental report and such supplement.

(2) The Association may, upon petition of any State, modify the final system plan to make further designations with respect to rail properties of railroads in reorganization in the region designated for transfer to the Corporation under such plan, if such designations (A) are likely to result in improved rail service on such rail properties and connecting rail properties, and (B) would not materially impair the profitability of the Corporation. Such designations, including designations of such rail properties to a State, a profitable railroad, or a responsible person, may be made at any time prior to delivery of the final system plan to the special court under section 719(c) of this title. Such further designations shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress, and the final system plan shall for all purposes be deemed to be approved as modified by such designations. Any action of the Association with respect to any such petition shall not be subject to review by any court.

(3)(A) Within 20 days after February 5, 1976, the Association may, by notice to the Congress and by publication in the Federal Register, modify, supplement, or add to the designations of rail properties in the final system plan if the Association finds such actions are necessary to—

(i) achieve the efficient implementation of the final system plan, or

(ii) provide for the offer to profitable railroads of rail properties designated in the final



system plan to the Corporation, if such properties are not essential in the operation of other rail properties of the Corporation but are or would be integrally related to the operation of rail properties of (or which are offered pursuant to the final system plan to) such profitable railroad, or

(iii) provide for the designation of additional rail properties to the Corporation or to a subsidiary thereof to enable the Corporation to serve efficiently a line of railroad designated to the Corporation in the final system plan if such line does not connect with any other line of railroad so designated to the Corporation or if such line would be served more efficiently as a consequence of such designation.

Any designation to a profitable railroad pursuant to this paragraph shall comply with the second sentence of section 716(d)(4) of this title, and shall only be made upon a finding by the Association that such designation is integrally related to an offer of rail properties to a profitable railroad in the final system plan, that the goals of the final system plan require that the rail properties be operated as a part of the rail properties included in such offer, and that the implementation of such designation will not materially and adversely affect the impact of such offer on the profitability of the Corporation or any profitable railroad operating in the region. Any designation to a profitable railroad pursuant to this subsection, which amends any prior offer, shall terminate 30 days after February 5, 1976, unless, prior to such date, such profitable railroad has notified the Association in writing of its acceptance of such amendment to the prior offer.

(B) If a line of railroad or any segment thereof is designated for rail service in the final system plan, no designation may be made by the Association pursuant to this paragraph which would result in such line or segment not being so designated. Any desig-

nations made pursuant to this paragraph shall be treated for all purposes as if they had been included in the final system plan adopted by the Association and reviewed by the Congress. The final system plan shall for all purposes be deemed to be approved as amended by such designations.

(C) Any designations made pursuant to this paragraph shall not be subject to review by any court.

(D) Any labor agreements entered into under section 778 of this title shall be subject to further negotiations for any modifications which may be necessary to implement designations made pursuant to this paragraph. As amended Pub.L. 94-210, Title VI, § 601(e), Feb. 5, 1976, 90 Stat. 84.

Section 209(b) of the 1973 Rail Act, as amended by Section 602(a) of the 1976 Rail Act [45 U.S.C.A. §719(b)]:

(b) *Special court.*—Within 30 days after January 2, 1974, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of Title 28 for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducteed by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 205 of Title 11. The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The special court may issue rules for the conduct of any proceedings under this section and under section 745 of this title, including rules with respect to the time within which motions may be filed, and with respect to appropriate representation of interests not otherwise represented (including the Secretary with respect to a petition by the Association in the case of a proposal developed by the Secretary, under such section 745 of this title). No determination by the panel under this subsection may be reviewed in any court.



Section 209(e) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act [45 U.S.C.A. §719(e)]:

(e) Original and exclusive jurisdiction.—(1) Notwithstanding any other provision of law, any civil action—

(A) for injunctive or other relief against the Association from the enforcement, operation, or execution of this chapter or any provision thereof, or from any action taken by the Association pursuant to authority conferred or purportedly conferred under this chapter;

(B) challenging the constitutionality of this chapter or any provision thereof;

(C) challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this chapter;

(D) to obtain, inspect, copy, or review any document in the possession or control of the As-

sociation that would be discoverable in litigation pursuant to section 743(c) of this title;

(E) brought after a conveyance, pursuant to section 743(b) of this title, to set aside or annul such conveyance or to secure in any way the reconveyance of any rail properties so conveyed; or

(F) with respect to continuing reorganization and supplemental transactions, in accordance with section 745 of this title;

shall be within the original and exclusive jurisdiction of the special court. The special court shall not hear or determine any such action prior to the date of conveyance, pursuant to section 743(b)(1) of this title, except as the Constitution may require. Relief shall not be granted in any action referred to in subparagraph (A), (C), or (E) unless the person seeking such relief establishes that the Association acted in reckless or deliberate disregard of applicable law.

(2) The original and exclusive jurisdiction of the special court shall include any action, whether filed by any interested person or initiated by the special court itself, to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 743(b) of this title in order to effect the purposes of this chapter or the goals of the final system plan. During the pendency of any proceeding described in this paragraph, the special court may enter such orders as it determines to be appropriate, including orders enjoining, restraining, conditioning, or limiting any conveyance, transfer, or use of any assset or right which is subject to such an order or which is at issue in such a proceeding, or which involves the enforcement of any liens or encumbrances upon such assets or rights. Any orders pursuant to this paragraph which interpret, alter, amend, modify, or implement orders entered by the special court shall be final and shall not be restrained or enjoined by any court.



(3) A final order or judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this chapter, in whole or in part, or of any action taken under this chapter, shall be reviewable by direct appeal to the Supreme Court of the United States in the same manner that an injunctive order may be appealed under section 1253 of Title 28. Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment.

Section 209(g) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act [45 U.S.C.A. §209(g)]:

(g) Stay of court proceedings.—The special court may stay or enjoin any action or proceeding in any State court or in any court of the United States other than the Supreme Court if such action or proceeding is contrary to any provision of this chapter, impairs the effective implementation of this chapter, or interferes with the execution of any order of the special court pursuant to this chapter.

Section 508(b) of the 1973 Rail Act, as amended by Section 617 of the 1976 Rail Act [45 U.S.C. §778(b)]:

(b) Selling railroads.—A selling railroad shall offer such employment and shall provide such employment protection to each of its employees who are adversely affected by such sale, pursuant to agreements to be entered into between it and the representatives of such employees prior to said sale: *Provided*, That (1) the protection and benefits provided for protected employees in such agreements shall be the same as those specified in section 775 of this title, and (2) unless and until such agreements are reached, the

selling railroad shall not enter into selling agreements pursuant to section 716(d) of this title.

Section 601(b)(1) of the 1973 Rail Act, as amended by Section 618(b) of the 1976 Rail Act [45 U.S.C.A. §791(b)(1)]:

> The provisions of the Interstate Commerce Act and the Bankruptcy Act (11 U.S.C. 205 et seq.) are inapplicable (A) to actions taken under this chapter to formulate and implement the final system plan where such action was in compliance with the requirements of such plan, and (B) to actions taken under this chapter to formulate or implement any supplemental transaction.

49 U.S.C. §1, par. (18):

(18)(a) No carrier by railroad subject to this chapter shall—

> (i) undertake the extension of any of its lines of railroad or the construction of any additional line of railroad;
>
> (ii) acquire or operate any such extension or any such additional line; or
>
> (iii) engage in transportation over, or by means of, any such extended or additional line of railroad,

unless such extension or additional line of railroad is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or will be enhanced by the construction and operation of such extended or additional line of railroad. Upon receipt of an application for such a certificate, the Commission shall (A) send a copy of application to the chief executive officer of each State that would be directly affected by the construction or operation of such extended or additional line, (B) send an accurate and understandable summary of such application to a newspaper of general circula-



tion in such affected area or areas with a request that such information be made available to the general public, (C) cause a copy of such summary to be published in the Federal Register, (D) take such other steps as it deems reasonable and effective to publicize such application, and (E) indicate in such transmissions and publications that each interested person is entitled to recommend to the Commission that it approve, disapprove, or take any other specified action with respect to such application.

(b) The Commission shall establish, and may from time to time amend, rules and regulations (as to hearings and other matters) to govern applications for, and the issuance of, any certificate required by subdivision (a). An application for such a certificate shall be submitted to the Commission in such form and manner and with such documentation as the Commission shall prescribe. The Commission may—

> (i) issue such a certificate in the form requested by the applicant;
>
> (ii) issue such a certificate with modifications in such form and subject to such terms and conditions as are necessary in the public interest; or
>
> (iii) refuse to issue such a certificate.

(c) Upon petition or upon its own initiative, the Commission may authorize any carrier by railroad subject to this chapter to extend any of its lines of railroad or to take any other action necessary for the provision of adequate, efficient, and safe facilities for the performance of such carrier's obligations under this chapter. No authorization shall be made unless the Commission finds that the expense thereof will not impair the ability of such carrier to perform its obligations to the public.

(d) Carriers by railroad subject to this chapter may, notwithstanding this paragraph and section 5 of this title, and without the approval of the Commission, enter into contracts, agreements, or other

arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The authority granted to the Commission under this paragraph shall not extend to the construction, acquisition, or operation or spur, industrial, team, switching, or side tracks if such tracks are located or intended to be located entirely within one State, and shall not apply to any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

(e) Any construction or operation which is contrary to any provision of this paragraph, of any regulations promulgated under this paragraph, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed $5,000 on each person who knowingly authorizes, consents to, or permits any violation of this paragraph or of the conditions of a certificate issued under this paragraph.

49 U.S.C. §5, par. (2):

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

* * *

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each



State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * *

## APPENDIX B

### SPECIAL COURT
### REGIONAL RAIL REORGANIZATION ACT OF 1973

CONSOLIDATED RAIL CORPORATION,

*Plaintiff,*

*v.*

STATE OF ILLINOIS, et al.,

*Defendants.*

Special Court Civil Action No. 76-9

Before FRIENDLY, *Presiding Judge,* WISDOM, and THOMSEN, *Judges.*

WISDOM, *Judge:*

This action raises important questions relating to the Special Court's exclusive jurisdiction, construction of the Rail Act,[1] and the integrity of the Final System Plan (FSP).[2] ConRail moved in this Court for a declaratory judgment and for injunctive relief against enforcement of a permanent injunction issued April 18, 1976, in State of Illinois, et al.[3] v. Consolidated Rail Corp., No. 76-2-042 (E.D. Ill. 1976). In that case the district court enjoined

[1] The Regional Rail Reorganization Act of 1973, as amended.

[2] As in previous opinions of this Court the following abbreviations are used:

| | | |
|---|---|---|
| FSP | — | Final System Plan |
| USRA | — | United States Railway Association |
| ConRail | — | Consolidated Rail Corporation |
| L & N | — | Louisville and Nashville Railroad |

[3] As appears in the style of this case, the defendants are the State of Illinois, four Illinois counties, two cities, and a state commission. For convenience, these defendants are referred to collectively as the State of Illinois or the State.



ConRail and the L & N from operating ConRail trains or equipment, under certain trackage agreements, over the lines of the L & N between Carmi and Danville, Illinois, by way of Evansville, Indiana, until the Interstate Commerce Commission approved such operations.[4] In this Court the State of Illinois moves to dismiss ConRail's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. We grant the declaratory judgment and preliminary injunction sought by ConRail. We deny the State's motion to dismiss the complaint.

### I. Factual Background

The dispute in this case concerns 63.4 miles of track between Paris and Lawrenceville, Illinois. This track is a segment of the Cairo Branch which, before April 1, 1976, was owned by the Penn Central Transportation Company. The Cairo Branch is located within the State of Illinois and extends from Cairo northward through Carmi, Mt. Carmel, Lawrenceville, Paris, and Danville to Chicago. This Branch is one of several north-south freight lines connecting the coal fields of southern Illinois and Indiana with the Chicago area. It is a light density line in "a terrible state of repair";[5] if used as a route for north-south through traffic, it would have to be extensively upgraded. As a consequence, in constructing the FSP the USRA considered the feasibility of routing ConRail traffic over connecting, well-maintained lines of solvent carriers as an alternative to conveyance of the entire

[4] Section 601(b) exempts from the operation of the Interstate Commerce Act actions that are in compliance with the requirements of the FSP.

[5] I FSP at 30. ConRail asserts that $6 million would be required initially to upgrade the track and roadbed.

Cairo Branch to ConRail. After extensive public hearings on the subject, USRA determined that ConRail traffic destined for Chicago should bypass part of the Cairo Branch and be routed over connecting trackage of solvent carriers—either on all L & N trackage from Carmi, Illinois east to Evansville, Indiana, and then north to Vincennes, Indiana and Danville, Illinois; or from Carmi to Lawrenceville, Illinois on ConRail track, east to Vincennes on B & O track and then north to Danville on L & N track.[6] In either event, through freight service to Chicago would not travel over the Paris-Lawrenceville section of the Cairo Branch but instead over the Vincennes-Danville track of the L & N. In exchange the L & N would be offered trackage rights into the southern Illinois coal fields on lines designated for conveyance to ConRail. The result would enable ConRail to consolidate its coal flow from southern Illinois and southern Indiana to Chicago over an existing high-capacity and well-maintained railroad. The L & N would be benefited by payments from ConRail for the use of the tracks; ConRail would avoid the expense of upgrading the Cairo line. The rerouting would therefore improve the operating efficiency of ConRail and the shipper service for the area served. I FSP at 30.

Accordingly, in the FSP the USRA designated to ConRail that portion of the Cairo Branch extending from Cairo to Lawrenceville. Beyond Lawrenceville, however, the 63.4 mile portion northward to Paris was designated to ConRail *only* if the L & N trackage rights "cannot be obtained." *See* II FSP at 65-69. "[I]f the necessary trackage rights over the L & N are acquired", the bypassed Lawrenceville to Paris portion of the Cairo Branch

[6] *See* I FSP 29-30, 267, 333, 334, 272-73; II FSP 65-67.



would remain the property of the Penn Central and be available for subsidy by the State of Illinois under Section 304 of the Rail Act.[7] It is clear then that ConRail's use of L & N trackage rights for the 63.4 miles in dispute was part of USRA's master plan and the designation of the offers of L & N's trackage rights could be defeated only if ConRail failed to obtain the timely execution of an agreement with L & N.

The trackage rights contract was executed by ConRail and L & N covering the L & N tracks north to Danville. The contract was executed on February 10, 1975, but was dated February 12, 1975. The State of Illinois contends that the agreement was invalid, because it was not concluded within the limitation period of Section 206(d)(4) (95 days from November 9, 1975, the effective date of the FSP). *See* Part IV of this opinion.

Beginning on April 1, 1976, ConRail began diverting its through coal traffic from the old Cairo Branch to the L & N tracks via Carmi-Evansville-Vincennes. On August 5, 1976, the State obtained a temporary restraining order in the district court in the eastern district of Illinois. On August 18, the district court granted a permanent injunction against ConRail, holding that the L & N trackage agreement was not timely concluded

[7] Section 304 of the Rail Act contemplates subsidy operation of rail lines otherwise subject to abandonment by reason of those lines having been excluded from the FSP for conveyance to ConRail or a solvent carrier. ConRail reached an operating agreement with the State of Illinois on March 29, 1976, whereby ConRail would provide a rail freight service over the Paris-Lawrenceville section of the old Penn Central Cairo branch, the segment not conveyed to ConRail, in exchange for a subsidy from Illinois. The effective date of this agreement was April 1, 1976.

within the meaning of § 206(d)(4) of the Act and forbidding ConRail from continuing such operations without Interstate Commerce Commission (I.C.C.) approval under 49 U.S.C. § 1 (18) ConRail appealed to the Seventh Circuit Court of Appeals on August 18. Although ConRail sought a stay of execution from the district court, which was denied, it did not seek a stay from the Seventh Circuit.

The interim solution sought by ConRail and L & N, while the appeal was pending in the Seventh Circuit, was the publication of a joint tariff on August 25 and 26 which would permit operation of ConRail coal trains over the same L & N trackage. The State of Illinois contested the tariff pursuant to I.C.C. rules and requested that the tariff be suspended pending investigation. The I.C.C. declined this request, but did begin an investigation. The tariff became effective on August 31, 1976, and will expire on December 31, 1976.

On September 1, 1976, before ConRail's request for a preliminary injunction in the instant proceeding, Illinois served on ConRail a notice of arbitration, purportedly authorized under Article XII of the ConRail-Illinois Operating Agreement, *see* footnote 7. The notice alleged that the issue of ConRail's diversion of coal traffic from the Lawrenceville-Paris section was arbitrable and that the diversion was in violation of the agreement. ConRail's motion requests injunctive relief to restrain the State of Illinois from proceeding with its notice of arbitration. The State of Illinois seeks dismissal of ConRail's complaint and enforcement of the arbitration.

## II. Jurisdiction

The threshold question in this proceeding is whether the action brought in the Iilinois district court was within



our exclusive jurisdiction. Although the arguments focused on several sections of the Act[8] as providing, vel non,

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[8] The other sections claimed to provide bases for exclusive jurisdiction are §§209(b) and (e)(2).

Section 209(b) states:

> (b) SPECIAL COURT.—Within 30 days after the date of enactment of this Act, the Association shall make application to the judicial panel on multi-district litigation authorized by section 1407 of title 28, United States Code, for the consolidation in a single, three-judge district court of the United States of all judicial proceedings with respect to the final system plan. Within 30 days after such application is received, the panel shall make the consolidation in a district court (cited herein as the "special court") which the panel determines to be convenient to the parties and the one most likely to be able to conduct any proceedings under this section with the least delay and the greatest possible fairness and ability. Such proceedings shall be conducted by the special court which shall be composed of three Federal judges who shall be selected by the panel, except that none of the judges selected may be a judge assigned to a proceeding involving any railroad in reorganization in the region under section 77 of the Bankruptcy Act (11 U.S.C. 205). The special court is authorized to exercise the powers of a district judge in any judicial district with respect to such proceedings and such powers shall include those of a reorganization court. The special court shall have the power to order the conveyance of rail properties of railroads leased, operated, or controlled by a railroad in reorganization in the region. The special court may issue rules for the conduct of any proceedings under this section and under section 305 of this Act, including rules with respect to the time within which motions may be filed, and with respect to appropriate representation of interests not otherwise represented (including the Secretary with respect to a petition by the Association in the case of a proposal developed by the Secretary, under such section 305). . . .

foundations for our claim of exclusive jurisdiction, the provision most obviously pertinent is § 209(e)(1)(C) which states that:

> Notwithstanding any other provision of law, any civil action . . . challenging the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under this Act . . . shall be within the original and exclusive jurisdiction of the special court.

The statutory language on its face seems clear in requiring a challenge to Association action or inaction.

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[8] (Continued)
Section 209(e)(2) states:

> (e) ORIGINAL AND EXCLUSIVE JURISDICTION.—
>
> . . .
>
> (2) The original and exclusive jurisdiction of the special court shall include any action, whether filed by any interested person or initiated by the special court itself, to interpret, alter, amend, modify, or implement any of the orders entered by such court pursuant to section 303(b) of this Act in order to effect the purposes of this Act or the goals of the final system plan. During the pendency of any proceeding described in this paragraph, the special court may enter such orders as it determines to be appropriate, including orders enjoining, restraining, conditioning, or limiting any conveyance, transfer, or use of any asset or right which is subject to such an order or which is at issue in such a proceeding, or which involves the enforcement of any liens or encumbrances upon such assets or rights. Any orders pursuant to this paragraph which interpret, alter, amend, modify, or implement orders entered by the special court shall be final and shall not be restrained or enjoined by any court.

In light of our disposition, we need not consider whether these sections would apply in the present context.



The critical determination is, then, the extent to which USRA's actions or inactions were challenged in the matters that led to the Illinois district court proceeding. USRA did not, in terms, require ConRail and L & N to conclude an agreement, nor was the original designation by USRA of L & N trackage challenged. In addition, the Illinois-ConRail Operating Agreement was not negotiated by USRA, nor does the interpretation of the agreement directly involve USRA.

Inquiry in greater depth persuades us, however, that the district court action violated our exclusive jurisdiction. The basis of the Illinois complaint that I.C.C. approval was required for Carmi-Evansville-Vincennes-Danville operations by ConRail was that the L & N trackage agreement was not timely under §206(d)(4). The fact of untimeliness, according to II FSP, pp. 65-69, triggers the alternative requirement that the Paris-Lawrenceville segment of the old Penn Central be considered automatically designated. As was said in regard to Segment 605a, FSP, a portion of the Paris-Lawrenceville line: "If the necessary trackage rights over the L & N *cannot* be obtained, this portion of the Cairo Branch *shall* be transferred to Consolidated Rail Corp." (emphasis added). If Illinois were correct that the ConRail-L & N trackage agreement was not timely concluded, the Paris-Lawrenceville segment of the Cairo line should have been conveyed to ConRail, for the condition necessary for its effective designation was fulfilled. The action by Illinois in the district court, then, implicitly challenged the legality of the USRA's *not* certifying the Paris-Lawrenceville Segment for conveyance.

As further support for the conclusion that §209(e)(1)(C) applies, we note that the district court proceeding drew

into question determinations as to the validity of the ConRail-L & N agreement in that USRA failed to designate Cairo pursuant to §208(d) which allows for additional designations. Again USRA's failure to include the Paris-Lawrenceville segment is implicitly challenged.

We conclude that USRA's actions were sufficiently connected to the proceedings in the Illinois district court to satisfy the requirements of §209(e)(1)(C). We note that any possible apprehension based on our determination today that the Special Court will be inundated with contract claims that bear a relation to the Act is misconceived. The major fact in the present case that allows for exclusive jurisdiction is the conditional designation of the Paris-Lawrenceville segment of the Cairo line in the FSP. It is USRA's failure to certify this portion of the Cairo line for conveyance that provides its connection to this action. Absent the alternative designation, there would be little basis for finding that the district court action was a challenge to the actions of the USRA.[9]

We need not pause long in our consideration whether the well-pleaded complaint rule, applicable generally to the interpretation of "arising under" in 28 U.S.C. §§ 1331, 1338, applies here to §209(e). There is no apparent reason, apart from considerations of symmetry, why it should apply in light of the extraordinary statutory power granted the Special Court to protect its jurisdiction and the need for this Court to preserve the integrity of the FSP and USRA's determinations in pursuance of the FSP and of the Act.

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[9] We express no view as to whether USRA's failure to make supplemental designations would alone be sufficient to sustain our exclusive jurisdiction as the issue is not before us.



## III. Res Judicata

Even if the assumption of jurisdiction by the district court was improper, *Stoll* v. *Gottlieb,* 305 U.S. 165 (1938) and its progeny might suggest that principles of res judicata should bar collateral attack on the Illinois judgment.[10] Examination of the basis of the *Stoll* rule, however, convinces us that its application in the present context is inappropriate.

The basic problem presented is the extent to which litigated questions[11] of subject matter jurisdiction are to be protected from collateral attack. Although the policies of terminating litigation, avoiding inconsistent results, and repose, which support application of res judicata to questions of subject matter jurisdiction, may vindicate the general rule that litigated questions of subject matter jurisdiction cannot be collaterally attacked, the policy basis for the rule should make us wary of its procrustean application. Here, countervailing policy considerations support the conclusion that Congress, in passing the Act and §209(e) in particular, intended to void determinations made by other courts, when these determinations

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[10] *United States* v. *UMW,* 330 U.S. 258 (1947); *Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940); *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66 (1939); *Des Moines Navigation & R.R.* v. *Iowa Homestead Co.,* 123 U.S. 552 (1887); *cf. Durfee* v. *Duke,* 375 U.S. 106 (1963); *Coe* v. *Coe,* 334 U.S. 378 (1948).

[11] While it may be that non-litigated questions of subject matter jurisdiction are given the same res judicata effect as litigated questions, *see Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U.S. 371 (1940), we need not address that issue here. The question of subject matter jurisdiction was argued in the district court.

were reserved for our exclusive consideration.[12] The legislative mandate overpowers the general rule.

*Kalb* v. *Feuerstein,* 308 U.S. 433 (1940), is the leading decision for the principle that the legislature may void judgments. In this case the Feuersteins began foreclosure proceedings against Kalb, a farmer, and his wife. Judgment of foreclosure was entered in the County Court of Walworth, Wisconsin. Congress then passed the Frazier-Lemke Act, and farmer Kalb's petition for composition and extension of time pursuant to that Act was duly filed and approved by the federal district court. The Frazier-Lemke Act was subsequently found unconstitutional in May of 1935. The federal court dismissed Kalb's petition and subsequently the sheriff sold his farm. The second Frazier-Lemke Act was then passed, the Kalbs' petition reinstituted, and after this, the sheriff's sale confirmed by the county court. The sheriff then ejected the Kalbs from the mortgaged farm.

The basic claim by the Kalbs was that the reinstatement of the petition under the second Frazier-Lemke Act divested the county court of jurisdiction to complete the foreclosure. On appeal the Supreme Court held that the statute specifically created an exception to the principle forbidding collateral attack. This was based on an interpretation of the purpose of the Bankruptcy Act, 11 U.S.C. 203 (Supp. 1938), specifically § 75. The question of subject matter jurisdiction was not litigated, but Justice

[12] *See* Dobbs, The Validation of Void Judgments: The Bootstrap Principle, 53 Va. L. Rev. 1003, 1241 (1967). *Cf.* Bosky & Braucher, Jurisdiction and Collateral Attack, 40 Colum. L. Rev. 1006 (1940); but cf., P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System, pp. 841-44 (2d ed. 1973).



Black stated that this would make no difference: "[C]onsiderations as to whether the issue of jurisdiction was actually contested in the county Court, or whether it could have been contested, are not applicable where the plenary power of Congress . . . has been exercised as in this Act." 308 U.S. at 444. (Footnotes omitted).

Although *Kalb* certainly does not control our determination here, the analogy is persuasive. The Rail Act proposes to cure a depressing, deteriorating situation in rail transportation in the northeast region of the country. This Special Court bears primary responsibility in making certain that the work of the USRA is implemented effectively. The exclusive jurisdiction sections make clear that Congress desired that one court make these necessary determinations. It is not every challenge relating to the Act that Congress brought within our exclusive province but only those where the critical nature of the determination demands the consistent interpretation possible only when review is concentrated in a single court. The ambit of the Special Court's exclusive jurisdiction was carefully considered by Congress. Congressional concern focused on providing for exclusive jurisdiction where the Special Court's central functions under the Rail Act were concerned while narrowing the exclusive jurisdiction to oust problems which could be effectively dealt with by other courts. The assumption was then that certain matters would be exclusively attended to by the Special Court, and congressional efforts were directed to determining which matters warranted sensitive treatment.

As originally framed in the 1975 Senate bill, exclusivity of the Special Court's jurisdiction was extremely broad, including virtually any action purportedly authorized by the Act. There was no limitation of the exclusive

jurisdiction to challenges of the Railway Association's actions. S. 2718, 94th Cong., 1st Sess., § 602(b), would have added to §209 of the Rail Act a provision that read:

> (e) Civil Actions--(1) Notwithstanding any other provision of law, any action—
>
> (A) for injunctive or other relief from the enforcement, operation, or execution of [the] Act or any provision thereof, or from any action taken pursuant to authority purportedly conferred under this Act;
>
> (B) challenging . . . the illegality of any action or any failure to take action pursuant to authority conferred or purportedly conferred under this Act;
>
> (C) to enforce or declare any rights under this Act;
>
> . . .
>
> shall be within the original and exclusive jurisdiction of the special court.

The Senate Report referring to this broad language noted that the new subsection (e) provided "that actions brought to challenge or to enforce or declare rights under or pursuant to the Act, the final system plan and the implementation of the final system plan, are within the original and exclusive jurisdiction of the special court. The jurisdiction of the special court extends to actions by interested parties or by the special court on its own motion, which may be required to give effect to the purposes of the Act and the goals of the final system plan." S. Rep. No. 499, 94th Cong., 1st Sess. at 83.

The House bill, with similar language, also proposed creating a broad scope for Special Court exclusive jurisdiction. Section 910(h) of H.R. 10979 would have added the following language to §209:



> (e) INJUNCTIVE AND DECLARATORY ACTIONS.—Notwithstanding any other provisions of law, any action—
>
> (1) for injunctive or other relief from operation, or execution of any part of this Act or from any action taken pursuant to authority purportedly conferred under this Act,
>
> (2) for a declaratory judgment .. . of the illegality of any action or of any failure to take action pursuant to authority conferred or purportedly conferred under this Act, or
>
> (3) to enforce or declare rights under this Act, shall be within the exclusive jurisdiction of the special court.

In Conference the language of the Senate and House bills was pruned by adding the requirement for exclusive jurisdiction that the suit be one challenging some action of the United States Railway Association, or seeking relief against USRA, rather than, for example, against ConRail, an interested solvent transferee, or a "financially responsible person". The Conference noted: "The conference substitute eliminates the provision giving the special court exclusive jurisdiction over any action to enforce or declare rights under the Rail Act of 1973. Many actions covered by this provision undoubtedly would be within the exclusive jurisdiction of the special court under other provisions of this bill, but still others may be of no concern to the central functions of the special court under the Rail Act of 1973, as amended." Report of the Committee of Conference, H.R. Rep. No. 781, at 188 (1976). The limitations on exclusive jurisdiction imposed in Conference express Congress's view of the Special Court's "central functions". This careful inquiry by Congress requires the conclusion that USRA action is not to be interfered with by any other court, a goal that is best

implemented by viewing the Act as voiding judgments inconsistent with our exclusive jurisdiction. Were we to view the Act differently, serious impediments would exist impairing the effective implementation of the Act. The present case is a paradigm of the kind of situation where our early unrestricted intervention is necessary; otherwise the implementation of USRA's efforts will be delayed indefinitely.

Congress found, as stated in §101(a), that essential rail service is threatened with cessation because of rail properties having been permitted to deteriorate. The primary purpose of the Act, then, was "[t]he reorganization of railroads in this [Northeast] region into an economically viable system capable of providing adequate and efficient service to the region". §101(b)(2). The problem is immediate and of great magnitude. Delay, therefore, unnecessarily experienced is something Congress sought to avoid.

It is not a sufficient answer that the appeal to the Seventh Circuit could correct the original error. There has already been delay, and further delay conflicts with the Act's objectives. USRA determinations, so critical to the effectiveness of this reorganization, were to be treated by this Court exclusively, and the carefully constructed exclusivity provision as well as the broader purposes of the Act indicate that infringements on our exclusive jurisdiction be deemed nullities.

The fact that Congress intended to void judgments inconsistent with our exclusive jurisdiction is further buttressed by §209(g), which gives this Court power to enjoin any court proceeding, other than in the Supreme Court, inconsistent with the effective implementation of the Act,



This extraordinary power lends additional support to the conclusion that Congress intended that certain decisions be made in the Special Court only and without delay. It is our view then that Congress intended that determinations made by other courts, which determinations come within our exclusive jurisdiction, are void.

In sum, the purposes of the Act and the language of the Act, particularly that of §§101(a), 101(b)(2), and 209(e)(1)(C), compel us to hold that Congress concluded that the policies supporting our exclusive jurisdiction outweigh the policies of res judicata. *United States* v. *United States Fidelity and Guaranty Company,* 309 U.S. 506 (1940); Restatement, Judgments § 10 (1940); Restatement 2d, Conflict of Laws, § 97, Commentary d. (1969); *In Re Penn Central Trans. Co.,* 384 F. Supp. 895, 914 (1974).[13]

While ConRail's course of litigating the jurisdictional issue in another court rather than coming to us for an injunction is not to be commended and, we trust, will not be repeated, we must enforce what we take to be the will of Congress.

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[13] Although in a different context, what we said in *In Re Penn Central* is relevant here. In deciding whether we should refuse to consider relevant issues of law simply because they were also decided by another court, we said:

> Congress envisioned a special role for this court, which in contrast to the *Connecticut General* court, can look at all the proceedings rather than only at one, and has available more ample factual records. We do not think Congress intended that in the cases which it put before us, raising issues of such major public importance, our review of the decisions of the district courts under the second sentence of § 207(b) should be trammeled by the decision of another court . . . .

## IV. Timely Conclusion of the ConRail-L & N Trackage Agreement

As stated, jurisdiction in this case is based on §209 (e)(1)(C). *See* Part II of this opinion. The standard of review is set forth in §209(e)(1). In pertinent part, this reads:

> Relief shall not be granted in any action referred to in subparagraph (A), (C), or (E) unless the person seeking such relief establishes that the Association acted in deliberate or reckless disregard of applicable law.

The validity of the trackage agreement depends on whether it was timely concluded within the meaning of §206(d)(4). This section requires that:

> Where the final system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation . . ., such designation and authorization shall terminate 95 days after the effective date of the final system plan unless, prior to such date, a binding agreement with respect to such properties has been entered into and concluded.

We note at the outset that the determination of the meaning of the relevant terms in §206(d)(4) is a question of federal law. We are not interpreting a contract in accordance with state law. And we are not concerned with the parol evidence rule of Illinois.[14] We are a federal

[14] The district court in Illinois based its decision on the assumption, mistakenly, we believe, that Illinois law applied and that the parol evidence rule of Illinois forbade evidence showing that the ConRail-L & N agreement was concluded on February 10 or no later than February 11, 1976.



court construing a federal statute and acting under an unusually strong congressional mandate to give effect to the determinations of the USRA as long as that association does not act in "deliberate or reckless disregard of applicable law".

There was considerable dispute in the district court as to when the ConRail-L & N Agreement was "entered into and concluded" within the meaning of §206(d)(4). It is undisputed, however, that the agreement was in fact executed on February 10, 1976, and post-dated February 12, 1976. The L & N was required to complete various labor agreements under Section 508(b). The trackage agreement was dated February 12, 1976, to allow for the execution of the labor agreements on February 11.[15] All parties agree that the trackage agreement was concluded at the latest by February 12, 1976.

The FSP became effective on November 9, 1975. The question is whether the February 12, 1976, date satisfies the 95 day requirement. The State contends that the 95th day was February 11. The district court agreed with the State. Rule 6(a) of the Federal Rules of Civil Procedure relating to computation of time states that the day of the event from which the designation period begins (November 9, 1975) is not included; the count would therefore begin with November 10.

Rule 6(a) establishes the method of computing "any period of time prescribed or allowed by these rules [of Federal Civil Procedure] . . . or by any applicable stat-

[15] There is apparently some dispute as to whether the labor agreements were completed by February 11. There seems to be no dispute, however, that the agreements were completed by February 12.

ute". The Rules govern only the procedure of federal district courts, not substantive law, and hence, as Professor Moore observes, Rule 6(a) "does not provide a general rule of statutory construction which courts are bound to apply to all time periods mentioned in any statute". 2 Moore's Federal Practice §6.06 at 1500.20 (2d Ed. 1975). But in computing various periods of time specified in a statute, a court may properly adopt, by analogy, the method of computation prescribed by Rule 6.

Our interpretation of the statute is that Congress did not intend to depart from the usual rule of computing a time limitation. Beginning with November 10 as the first day and counting to 95 gives February 12 as the last date before termination of the designation.

The language of the section supports this view: Section 206(d)(4) states that the designations are effective until "95 days *after* the effective date of the final system plan". When the section goes on to say "unless prior to such date", it means prior to midnight of the 95th day. The result of this counting is that February 12, 1976, is the last day on which an effective agreement could be reached.

We hold that the ConRail-L & N agreement was timely concluded within the meaning of §206(d)(4). A fortiori, neither USRA's "determination" that the agreement was valid nor its failure to certify the Paris-Lawrenceville segment for conveyance was in "reckless or deliberate disregard of applicable law". §209(e)(1)(C).



## V. Standards Applicable to Issuance of Preliminary Injunction

This Court, in *Trustees of the Property of Penn Central Transportation Co.* v. *Consolidated Rail Co.*, ..... F. Supp. ....., Sp. Ct. Reporter, D3-000002, at 000010 (Sp. Ct. R.R.R.A. May 14, 1976), accepted *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921 (D. C. Cir. 1958) as enunciating the applicable standards governing the issuance of a preliminary injunction:

> The controlling standards for the issuance of such an injunction in a case like this, where the public interest is deeply implicated, were classically stated . . . [as] probability of success on the merits; irreparable injury to the proponent; harm to the interested parties; and the public interest.

(A) As our discussion demonstrates, ConRail has an overwhelming probability of success on the merits.

(B) The only harm to Illinois is that it is restrained from interfering with ConRail's providing rail service over the L & N trackage. But Illinois would have been in this same position if it had originally complied with the USRA determinations regarding the ConRail-L & N trackage agreement. The financial harm to Illinois is no more than that contemplated by the FSP and specified in the financial calculations attached to its agreement with ConRail.

In this context ConRail need not show that unless the injunction issues "rigor mortis will set in forthwith." *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966). That the harm to ConRail cannot be repaired constitutes a sufficient showing. *Id.*

Although it would appear that ConRail is permitted to route shipments over the L & N as a consequence of the tariff filed with the I.C.C., at least until December 31, 1976, there is a sufficient showing of harm to ConRail. To begin, the tariff will expire on December 31 and it is not certain that a final decision by this Court will antedate the expiration date. The fact that the I.C.C. might approve a tariff extending beyond December 31 is not a certainty. Denial of the preliminary relief requested will frustrate further the tasks envisioned for ConRail in §302 of the Act—the improvement in the efficiency of railroad operations.

(C) ConRail's operations pursuant to the congressionally approved FSP represent public interest planning by USRA. The Act and FSP aim toward the achievement of an efficient, viable rail transportation service in a large and important section of the country. Actions that interfere with the attainment of that goal seriously harm the public interest.

The balancing of interests in this case favor grant of the preliminary injunction.[16] The harm to Illinois is no

[16] Our power to grant the injunction is explicitly granted in §209(g), which permits us to enjoin any court proceeding, other than in the Supreme Court, which impairs the effective implementation of the Rail Act. Arbitration may or may not be a part of a court proceeding. Section 209(g), however, should be read with reference to the purpose it sought to achieve. The Special Court is to protect against impairments of the Act and was given injunctive power to carry out this task. There is no policy basis for assuming that Congress granted this Court power to enjoin a court of appeals but left us powerless to prevent an arbitration which might impair the effective implementation of the Act. Particularly since §1202(c) of the Operating Agreement makes the arbitration award en-



more than that contemplated by the FSP. ConRail, on the other hand, appears likely to succeed on the merits, and its ability to pursue objectives important both to ConRail and to the public would be impaired if ConRail's request were denied. On balance, the interests in favor of preliminary relief to ConRail preponderate.

## VI. Scope of the Preliminary Injunction

As for the arbitration, our only concern is that the arbitrators not predicate any conclusions on the basis of the invalidity of the ConRail-L & N trackage agreement. The arbitrators are enjoined from doing so. The State of Illinois and ConRail have no power to agree by arbitration to a review of the FSP or to a rewriting of USRA's determinations. In other respects the arbitration is not subject to the preliminary injunction.

In light of what we have said, this Court:

(1) Declares that the Illinois-L & N trackage rights agreement was timely entered into and concluded within the meaning of §206(d)(4);

(2) Declares that the State of Illinois and the other defendants have no right of action and no right to arbitrate the issues of the validity of the ConRail-L & N

[16] (Continued)
forceable in court as a matter of contract law, the quasi-judicial nature of the arbitration makes application of §209(g) appropriate. We need not rely solely on §209(g), however, as §209(b) gives us the powers of a normal reorganization court and of a district judge in any judicial district. Thus §209(b) supplies power to enjoin the arbitration.

trackage agreement in any forum other than this Court and that the litigation of those issues in any other forum is a nullity;

(3) Preliminarily enjoins all defendants from seeking to enforce the injunction they obtained in the Illinois district court and from seeking resolution of the issue of the validity of the ConRail-L & N trackage agreement except in this Court; and

(4) Denies the State's motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

/s/ Henry J. Friendly
Presiding Judge

/s/ John Minor Wisdom
Judge

/s/ Roszel C. Thomsen
Judge

November 29, 1976



## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

STATE OF ILLINOIS, et al.,
*Plaintiffs,*

vs.

CONSOLIDATED RAIL CORPORATION and THE LOUISVILLE & NASHVILLE RAILROAD,
*Defendants.*

No. 76-2-042

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Motion of plaintiffs for a Temporary Restraining Order having come on for hearing, statements of counsel and testimony having been heard in open Court with all parties having full opportunity to present evidence, examine and cross-examine witnesses, file briefs and make arguments, and the Court being fully advised in the premises, the Court herewith makes the following Findings of Fact and Conclusions of Law:

### I

### FINDINGS OF FACT

1. Plaintiffs filed their complaint herein on April 2, 1976, and an Amended Complaint April 14, 1976. Defendant Consolidated Rail Corporation filed its Answer and Affirmative Defenses on April 30, 1976, and the defendant Louisville & Nashville Railroad filed its Petition to Intervene April 28, 1976, and its Answer and Affirmative Defenses May 3, 1976.

2. Defendant Consolidated Rail Corporation is a Corporation organized under the laws of the State of Pennsylvania and a citizen thereof and transacts business and is found within the Eastern District of Illinois. It was created by Congress, pursuant to the Regional Rail Reorganization Act of 1973 as a for-profit corporation to which properties and routes of certain bankrupt railroads, including the Penn Central, would be transferred. Pursuant thereto, and on April 1, 1976, it took over operations of the Penn Central in this Judicial District.

3. Defendant-Intervenor Louisville & Nashville Railroad is a corporation organized under the laws of the State of Kentucky and a citizen thereof and transacts business and is found within the Eastern District of Illinois.

4. Plaintiff The State of Illinois is one of fifty sovereign states of the United States and is proceeding here through the Illinois Attorney General and on behalf of the Illinois Department of Transportation.

5. Plaintiffs, Clark County, Crawford County, Lawrence County and Wabash County are county governments and corporations organized under the laws of the State of Illinois.

6. Plaintiffs City of Robinson and the City of Mt. Carmel are municipal corporations organized under the laws of the State of Illinois.

7. Plaintiff Greater Wabash Regional Planning Commission is a corporation organized under the laws of the State of Illinois, with membership from the counties of Crawford, Clark, Lawrence and Wabash.

8. The railroad operations sought to be enjoined by the plaintiffs are subject to and governed by the pro-



visions of the Interstate Commerce Act, 49 U.S.C. Sec. 1 (18) and Sec. 5 (2), the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 et seq., the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, Sec. 101 et seq., approved February 5, 1976 (RRRRA), which are each, and taken together, Act of Congress to regulate commerce within the meaning of 28 U.S.C. Sec. 1337.

9. The amount in controversy exceeds $10,000.00 exclusive of interests and costs.

10. Defendants contend that the Special Court created by 45 U.S.C. Sec. 719 (a) & (b) has original and exclusive jurisdiction over the subject matter of this action, and that the Federal District Court is without jurisdiction. This section was amended by Sec. 602 (b) of the RRRRA of 1976. A reading of Sec. 719 as amended, including the legislative history of Sec. 602 (b) of the RRRRA of 1976, does not convince the Court that the subject matter of the complaint herein falls within the original and exclusive jurisdiction of the Special Court. Defendants further contend that the Interstate Commerce Commission has exclusive jurisdiction (sic) under 49 U.S.C. Sec. 5 (8) to seek injunctive relief in the District Courts for violations of 49 U.S.C. Sec. 5 (2). While it is true that Sec. 5 (8) gives the I.C.C. "standing", in such instances, it is clear that by the savings clause of the Act, 49 U.S.C. Sec. 22 (1), the remedy is supplemental rather than exclusive. Without so deciding, it may be true that the Commission is the only party that may request an injunction to issue to compel obedience to its order, *Clemens* v. *Central R. Co. of New Jersey,* 264 F.Supp. 551 (D.C.Pa. 1967), rvsd. on other grounds, 399 F.2d 825, or where a party to the action has already been

charged in complaint before the Commission with a violation of Section 5. *Chicago S.S. & S.B.B.R.* v. *Monon R.R.*, 235 F.Supp, 984 (D.C.Ill. 1964). Plaintiffs have cited to this Court cases from other federal district courts and from the U.S. Court of Appeals for the Seventh Circuit, *Chicago and North Western Ry. Co.* v. *Peoria and Pekin Union Ry. Co.*, 319 F.2d 117 (7th Cir. 1963), in which injunctions were properly granted plaintiffs other than the Interstate Commerce Commission concerning 49 U.S.C. Sec. 5 agreements subsequent to the enactment of the Emergency Railroad Transportation Act of 1933 which added the provision to Section 5 codified in 49 U.S.C. Sec. 5 (8). Plaintiffs further contend and the Court agrees that this Court has jurisdiction under 28 U.S.C. Sec. 1331 and 28 U.S.C. Sec. 1337 to grant pursuant to 28 U.S.C. Sec. 1651 the injunctive relief sought for enforcement of Sec. 5 (2) and the right of the plaintiffs to bring their action for injunction is in no way diminished by Sec. 5 (8). Plaintiffs also contend and the Court agrees that Sec. 1 (18) of the Interstate Commerce Act as amended by Sec. 801 (a) of the RRRRA grants this Court jurisdiction to enjoin operations contrary to the provisions of Sec. 1 (18). See, e.g.: *Thompson* v. *Texas Mexican Ry. Co.* 328 U.S. 134, 144 (1946); *Chicago & Northwestern Ry. Co.* v. *Chicago, Milwaukee St. Paul & Pacific R. Co.*, 502 F.2d 193, 196 (7th Cir. 1974); *United Transportation Union* v. *Burlington Northern, Inc.*, 319 F.Supp. 451 (D. Minn. 1970). This Court is persuaded that the required authorizations to operate over trackage as opposed to the terms and conditions of acquiring a property interest in that trackage is governed by 49 U.S.C. 1 (18). The additional element of track construction to allow for the operation of mainline interstate trains, present in this case, further supports the



conclusion that 49 U.S.C. Sec. 1 (18) applies here. *Texas & Pacific Ry. Co.*, v. *Gulf Colorado & Santa Fe Ry., Co.*, 270 U.S. 266, 278, (1926).

11. To provide for a comprehensive federally financed reorganization of the Penn Central Railroad and six other bankrupt carriers, Congress passed and the President signed into law the Regional Rail Reorganization Act of 1973, hereinafter referred to as the RRRA. This Act applied to a 17 state region in the Northeast and Midwest portions of the United States of America, involving an area, roughly, north of the Mason-Dixon Line and east of the Mississippi River.

12. The RRRA created three new instrumentalities: the United States Railway Association (USRA); the Consolidated Rail Corporation (ConRail); and, the Rail Service Planning Office (RSPO). USRA was assigned the task of developing a preliminary reorganization called the Preliminary System Plan (PSP), which was published for comment and criticism by the general public at hearings scheduled by RSPO. Based on these public comments and a RSPO critique of PSP, USRA developed a final proposal under the RRRA called the Final System Plan (FSP). This Plan became effective November 9, 1975.

13. Under the RRRA, ConRail was created as a for-profit corporation, to which a special Three Judge Bankruptcy Court (the Special Court) in Washington would transfer rail property and other assets of the bankrupt carriers in exchange for ConRail stock and other securities. This transfer occurred April 1, 1976, and ConRail began its common carrier service on that date.

14. The Final System Plan developed by USRA stipulates, as required by Sec. 206 (c) of the RRRA, 45

U.S.C. Sec. 716 (c), which bankrupt properties must be transferred to ConRail or other solvent carriers. Under said Sec. 206 (c), the Plan also designates which rail properties (including trackage rights agreements) of solvent carriers may be acquired by ConRail within certain time limitations set forth in Sec. 206 (d)(4), 45 U.S.C. Sec. 716 (d)(4). In addition, the Plan indicates which bankrupt rail lines are excluded from the ConRail system and are thus "available for subsidy."

15. All proposals in the Final System Plan for acquisitions by ConRail of the properties (including trackage rights) of solvent carriers were not binding on any carrier. Under Sec. 206 (d)(4) acceptance by profitable carriers of such proposals was required to be achieved through binding agreements entered into within certain deadlines. Two purported Louisville & Nashville—ConRail agreements, dated February 12, 1976, were subject to the time deadline provisions set forth in Sec. 206 (d)(4) of the RRRA, as amended by Sec. 607 (o) of the RRRA:

> "Where the final system plan designates specified rail properties of a profitable railroad operating in the region as authorized to be offered for sale or lease to the Corporation or to other profitable railroads operating in the region, such designation and authorization shall terminate 95 days after the effective date of the final system plan unless, *prior to such date,* a binding agreement with respect to such properties has been entered into and concluded." Public Law 93-236, 87 Sts. 997, Sec. 206 (d)(4); 45 U.S.C. 716 (d)(4); as amended by Public Law 94-210, Sec. 607 (o), February 5, 1976, (emphasis added).

Since the Final System Plan took effect November 9, 1975, the deadline for entering into a valid agreement under Sec. 206 (d)(4) as amended by Pub. Law 94-210 Sec. 607 (o) was midnight, February 11, 1976.



16. On April 1, 1976, defendant ConRail commenced operating certain of its freight trains on certain rail properties of the Louisville & Nashville Railroad, pursuant to the purported agreements described above in Paragraph 15. These operations began at Carmi, Illinois, within the State of Illinois, and continued southeasterly to cross the Wabash River into the City of Evansville, Indiana, where the trains of ConRail were switched onto northbound track of the Louisville & Nashville Railroad whereupon they continued over such track to a point within Indiana just east of Danville, Illinois, and thence moved westward across the Illinois border into Danville. Said trains then continued northward out of Danville, Illinois, to the Chicago market area.

17. Prior to April 1, 1976, such trains were moved over the Penn Central track between Carmi and Danville, Illinois. Such operations took place entirely within the State of Illinois, and the trains passed through Clark, Crawford, Edgar, Wabash and Lawrence Counties enroute from Carmi to Danville. This operation included trackage between Lawrenceville and Paris, Illinois.

18. Except as the defendants would have complied with the statutory deadline established by Sec. 206 (d)(4) of the RRRA as amended, the requirement for an application to the Interstate Commerce Commission for authority to operate under 49 U.S.C. Sec. 1 (18) and under 49 U.S.C. Sec. 5 (2) is not excused by any of the provisions of the RRRA, as amended, 45 U.S.C. Sec. 701 et seq., or by the provisions of the RRRRA.

19. The defendants have sought to prove by affidavit and testimony that the trackage rights agreements referred to in Paragraph 15 above were in fact signed and concluded between them on February 10, 1976, instead of

February 12, 1976, the date appearing on the face of each of the agreements. The Court finds, however, that the agreements are fully integrated final expressions of the defendants' intent, and further finds that, on the question of receiving the proofs which defendants have tendered on the issue of the date when the agreements were concluded, the Court is bound by the doctrine set forth by the Illinois Supreme Court in *Walter* v. *Sohio Petroleum Co.*, 402 Ill. 33, as follows:

> "It is the well-settled rule that parol evidence is not admissible to contradict the terms of a contract in writing actually entered into, and particularly against an innocent third party."

In addition, the Court finds as a matter of fact that the dates on the instruments accurately reflect the defendants' intent, which was to date the agreements in such a way as to maximize the time in which they had to conclude certain labor agreements, (see paragraph 20 *infra*).

20. There exists a further reason why the trackage rights agreements were not capable of being finally concluded prior to midnight February 11, 1976, within the meaning of Sec. 206 (d)(4) of the RRRA as amended. Section 508 (a) and (b) of the RRRRA as amended requires that both carriers participating in such agreements must, as a precondition, conclude with their affected labor unions agreements for the protection of union membership. The affidavit of Emereid Cole submitted by the defendants, together with his testimony, shows that all such agreements had not been concluded prior to the time the defendants would seek to prove they actually signed the agreements. An analysis of the agreements themselves in light of the precise statutory language of Sec. 206 (d)(4), supports a finding of their invalidity as



well. Even if the purported agreements had been executed in a binding manner so as to support the contention that they were validly "entered into", the parties did not "conclude" the agreements before the February 12, 1976 deadline. Until ConRail notified the Louisville & Nashville of their intention to use the "joint track", ConRail had the option to effectuate or not effectuate the agreements by their own terms until January 1, 1977.

Furthermore, the purported agreements prohibit ConRail trains from entering or leaving the Louisville & Nashville tracks at any point other than Carmi, Illinois or Woodland Junction, Illinois. (See Agreement, Art. I, B(ii).) The evidence indicates that although ConRail trains have left or entered the Louisville & Nashville lines on the south at Carmi, Illinois, they have never operated through to Woodland Junction, Illinois on the north, but have instead entered or left the Louisville & Nashville tracks on the north at Terre Haute, Indiana or Danville, Illinois. Thus, the Defendants are not even operating pursuant to the purported agreements but in fact have varied the agreements subsequent to their execution.

21. Because the trackage rights agreements between them were not properly concluded within the time limitations of Sec. 206 (d)(4) of the RRRA as amended, ConRail and Louisville and Nashville Railroad are required to seek approval of the Interstate Commerce Commission pursuant to 49 U.S.C. Sec. 1 (18) prior to instituting the operation by ConRail over the Louisville & Nashville lines described in Paragraph 16 above.

22. Defendants admitted during hearings that they had not applied to the Interstate Commerce Commission

for authority to operate under the trackage rights agreements.

23. With regard to lines excluded from the ConRail system, the trustees of the Penn Central could, under the Final System Plan, promptly abandon and sell excluded lines without Commerce Commission approval, unless a state offered the trustees and ConRail a subsidy to continue rail operations in accordance with the combined federal-state subsidy program described below.

24. A portion of the former Penn Central road described above, on which ConRail was operating prior to diverting traffic over Louisville & Nashville lines in Indiana, is such an excluded line, known as the Paris to Lawrenceville portion of the Cairo branch of the former Penn Central Railroad. The Cairo branch in its entirety constitutes a major north-south mainline running from Chicago, Illinois via Danville, Paris and Lawrenceville to the Cairo, Illinois, "Gateway" all along the Eastern border of the State of Illinois.

25. Pursuant to Title IV the State of Illinois developed a "State Rail Plan", which was ultimately approved by the Federal Railroad Administration. Concurrently, the Illinois State Legislature passed an Act providing funds for the joint state-federal subsidy program (Illinois Revised Statutes, Paragraph 127, Sec. 49.25 (a)-(g) ). This Statute required the Illinois Department of Transportation to implement the State Rail Plan and to both continue and improve rail service on all lines in Illinois excluded from the ConRail system in the Final System Plan.

26. The Paris to Lawrenceville portion of the Cairo branch of the former Penn Central is under subsidy under the State Rail Plan.



27. Pursuant to the State Rail Plan, the Illinois Department of Transportation contracted with ConRail to provide locomotive, crew and car service on the Paris-Lawrenceville line. Under this contract, and pursuant to the provisions of Sec. 304 of the RRRA, ConRail receives a subsidy payment from the State of Illinois to the extent that costs of operations exceed revenues from freight traffic either generated on the line or, in part, moving over it. In the event that revenues exceed costs, then the line is "profitable". These "profits" go to the State of Illinois, not to ConRail. The State may use such profits to defray expenses of its rail program.

28. A revenue loss to the State of Illinois of approximately $1,000,000 per year results from large unit train shipments of coal traditionally moved on the Cairo branch being moved over the Louisville & Nashville rail lines rather than moving over the State subsidized Paris-Lawrenceville line.

29. Since operating costs on the line are fixed costs, any reduction in freight revenues which could otherwise be set off against such costs necessarily increases the State's subsidy payment to ConRail. Diversion of freight traffic at Carmi to the Louisville & Nashville line reduced freight revenues and has the effect of increasing subsidy payments to ConRail, although certain of these costs are reimbursed by the Federal Government. Furthermore, diversion of such traffic deprives the State of Illinois of substantial revenues and profits from unit coal train operations. These losses of revenues and increased subsidy payments cause irreparable loss to the State of Illinois. Dollars expended for increased operation costs must be taken from the State Rail Plans rehabilitation program, thereby substantially and irreparably restricting

rehabilitation of the Paris-Lawrenceville line planned by the State.

30. The plaintiff cities and counties, situated along the Cairo branch of the former Penn Central line will lose substantial revenues from an ultimate loss of taxable properties. The Court finds that as a result of the diversion of rail traffic, as aforementioned, there will be a significant decline in general economic and business activity along said route, due to the ultimate loss of viable competitive rail service to those locations.

## II

## CONCLUSIONS OF LAW

1. This Court has jurisdiction at this time, not the Special Court. Section 209 of the RRRA as amended by Sec. 602(b) of the RRRRA does not apply to the proceedings before this Court, rather this Court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1332, 28 U.S.C. 1337, 28 U.S.C. 1391, 28 U.S.C. 1651, 45 U.S.C. 701 et seq., 49 U.S.C. Sec. 1 (18), 49 U.S.C. Sec. 5(2), Pub. Law 94-210 Sec. 101 et seq. 49 U.S.C. Sec. 1 (18) as amended by Sec-801 (a) of the RRRRA grants an appropriate district court jurisdiction to enjoin operations contrary to Sec. 1(18) which includes operations under trackage rights. Section 801(e) of the RRRRA specifically provides for the Attorney General of an affected state to bring a civil action to enjoin any operation that is contrary to the provisions of Paragraph (a) of Sec. 1(18).

2. Because the trackage rights agreements entered into between the defendants dated February 12, 1976, were neither final nor timely within the terms, definitions and meanings of Sec. 206(d)(4) of the RRRA as amended,



the operations by the defendant ConRail over Louisville & Nashville lines pursuant to those agreements are not exempted from review by the I.C.C.

3. The operations of ConRail trains over the Louisville & Nashville lines are and continue to be without authority of the Interstate Commerce Commission and, therefore, in violation of the Interstate Commerce Act, as amended, in particular, 49 U.S.C. Sec. 1(18), 49 U.S.C. Sec. 5(2).

4. Under the facts found by this Court, the requirement of I.C.C. approval of the trackage rights agreements in question under 49 U.S.C. Sec. 5(2) is not excused by any of the provisions of the RRRA, as amended, 45 U.S.C. Sec. 701, et seq., or any provision of the RRRRA.

5. A temporary restraining order will cause no irreparable harm to the defendants and the issuance of a temporary restraining order will preserve the status quo and preclude further illegal operations by the defendants. The defendants may petition the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity, or other approval to implement any agreements they may have between themselves. Furthermore, ConRail may move all through coal and other freight, currently moving through Indiana, on the Cairo line from Carmi to Danville, Illinois, should it so desire.

6. If a restraining order is not granted, plaintiffs will suffer irreparable harm in at least the following ways:

(a) Increase in subsidy payments to ConRail;

(b) Loss of revenue on the State of Illinois subsidized line between Lawrenceville and Paris;

(c) Impairment of track rehabilitation occasioned by the necessity to divert rehabilitation funds to operation expenses;

(d) Loss of revenue to the communities situated along the Cairo branch.

Entered This 5th day of August, A.D., 1976.

/s/ Henry S. Wise
Chief Judge



## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ILLINOIS

STATE OF ILLINOIS, et al.,

*Plaintiffs,*

vs.

CONSOLIDATED RAIL CORPORATION and THE LOUISVILLE & NASHVILLE RAILROAD,

*Defendants.*

No. 76-2-042

PERMANENT INJUNCTION

Motion of plaintiffs for a Permanent Injunction having come on for hearing, both sides present in open Court, oral argument heard, and the Court being fully advised in the premises, having filed its Findings of Fact and Conclusions of Law and having directed that its order enter in accordance therewith,

It Is Therefore Ordered That the defendants Consolidated Rail Corporation and The Louisville & Nashville Railroad, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with the defendants to whom actual notice of this order shall come, be and are hereby enjoined and restrained from operating or participating in the operation of ConRail trains and/or equipment under the Trackage Rights Agreements at issue herein over the lines of the Louisville & Nashville Railroad between Carmi and Danville, Illinois, by way of Evansville, Indiana, until

such time as approval of such operations is granted by the Interstate Commerce Commission.

Entered this 18th day of August, A.D. 1976 at 4:30 P.M.

/s/ Henry S. Wise
Chief Judge

Supreme Court, U.S.
FILED
JAN 19 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1976.

## No. 76-841.

**STATE OF ILLINOIS, et al.,**

*Petitioners,*

*v.*

**CONSOLIDATED RAIL CORPORATION,**

*Respondent.*

**On Petition for a Writ of Certiorari to the Special Court Regional Rail Reorganization Act of 1973.**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## INDEX.


| | Page |
|---|---|
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 3 |
| ADDITIONAL STATUTORY PROVISIONS INVOLVED AND RELEVANT PORTIONS OF THE FINAL SYSTEM PLAN | 4 |
| COUNTERSTATEMENT OF THE CASE | 5 |
| ARGUMENT | 9 |
| I. Neither the Second Nor Third Question Presented in the Petition Warrants Consideration by This Court | 9 |
| II. The Controversy Below Was One Within the Original and Exclusive Jurisdiction of the Special Court and No Purpose Would Be Served by Review of That Conclusion | 13 |
| CONCLUSION | 16 |
| APPENDIX A—Statutes | 1a |
| APPENDIX B—Excerpts From Final System Plan | 1b |

## TABLE OF CITATIONS.


**Cases:** Page

Brown v. Chote, 411 U.S. 452 (1973) ..... 11
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940) ..... 10
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) ..... 11
Elliot v. Lessee of Peirsol, 2[illegible] U.S. (1 Pet.) 328 (1828) ..... 10
In re Penn Central Transportation Company, 384 F. Supp. 895 (Sp. Ct. RRRA 1974) ..... 10
Kalb v. Feuerstein, 308 U.S. 433 (1940) ..... 10
Lockerty v. Phillips, 319 U.S. 182 (1943) ..... 14
New Haven Inclusion Cases, 399 U.S. 392 (1970) ..... 10
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974). 4, 10
Stoll v. Gottlieb, 305 U.S. 165 (1938) ..... 10
United States v. Ohio, 487 F.2d 936 (Temp. Emerg. Ct. App. 1973) (alternative holding), *cert. denied* 421 U.S. 1014 (1975) ..... 10
U.S. v. U.S. Fidelity & Guaranty Co., 309 U.S. 506 (1940) .. 10
Vallely v. Northern Fire Ins. Co., 254 U.S. 348 (1920) ..... 10
Warren v. Palmer, 310 U.S. 132 (1940) ..... 10
Williamson v. Berry, 49 U.S. (8 How.) 495 (1850) ..... 10

**Statutes:**

28 U.S.C. § 1253 ..... 2
28 U.S.C. § 1[illegible]91 ..... 2
28 U.S.C. § 1292(a)(1) ..... 2
Rail Transportation Improvement Act of 1976, P.L. 94-555, October 19, 1976 ..... 4
Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, Section 601(e), February 5, 1976 ..... 4, 7


## TABLE OF CITATIONS (Continued).


**Statutes (Continued):** Page

Regional Rail Reorganization Act of 1973, as amended:
Section 101(a), 45 U.S.C. § 701(a) ..... 5
Section 101(b), 45 U.S.C. § 701(b) ..... 5
Section 202, 45 U.S.C. § 712 ..... 5, 6
Section 205, 45 U.S.C. § 715 ..... 6
Section 206(d), 45 U.S.C. § 716(d) ..... 7, 11, 13
Section 208(d), 45 U.S.C. § 718(d) ..... 7, 14
Section 20[illegible](b), 45 U.S.C. § 719(b) ..... 9, 10, 12
Section 209(e), 45 U.S.C. § 719(e) ....1, 2, 4, 5, 11, 13, 14, 15
Section 209(g), 45 U.S.C. § 719(g) ..... 3, 12
Section 303(b), 45 U.S.C. § 743(b) ..... 8
Section 304, 45 U.S.C. § 744 ..... 6, 8

**Other Authorities:**

LEGISLATIVE HISTORY

Conference Report, S. Rep. No. 595, 94th Cong., 2d Sess. 187-88 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 194-95, H.R. Rep. No. 781, 94th Cong., 2d Sess. 187-88 (1976) ..... 15
Conference Report, H.R. Rep. No. 744, 93rd Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 3320-23 ..... 15
H.R. Rep. No. 925, 94th Cong., 1st Sess. 128 (1975) ..... 15
S. Rep. No. 499, 94th Cong., 1st Sess. 83-85 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 90-92 ..... 15
S. Rep. No. 601, 93rd Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 3244 ..... 15
119 Cong. Rec. S. 23780 ..... 15

MISCELLANEOUS

Dobbs, The Validation of Void Judgments: The Bootstrap Principle, 53 Va. L. Rev. (Part I) 1003, (Part II) 1241 (1967) ..... 10

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, Consolidated Rail Corporation ("Conrail"), United States Railway Association ("USRA"), and the Louisville & Nashville Railroad Company ("L&N"), join in this brief in opposition to the petition for a writ of certiorari to the Special Court, Regional Rail Reorganization Act of 1973, filed by the State of Illinois and various local governmental units of the State ("Petitioners"). Conrail was the original plaintiff in the action below, but USRA and the L&N were permitted, without objection, to intervene as plaintiffs. As intervenors, USRA and the L&N are properly deemed respondents in this Court.

## JURISDICTION.

Petitioners state that the jurisdiction of this Court to review the order entered below is conferred by Section 209(e)(3) of the Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 719(e)(3) ("Rail Act"). The relevant portion of that Section permits review (by petition for a writ of certiorari) of a "final order or judgment of the special court." Respondents call attention to the fact that the order entered below is interlocutory in nature, and that interlocutory orders may not (though we take no position on the issue) have been comprehended within the language cited in Section 209(e)(3). In the same Section, when referring to review of "any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this chapter, in whole or in part . . . ," Congress referred to review by direct appeal "in the same manner that an injunctive order may be appealed under section 1253 of Title 28 [United States Code]." 28 U.S.C. § 1253, by providing for appeals from "an interlocutory or permanent injunction," recognizes the distinction between final orders and those which are interlocutory in character. The same distinction emerges from a comparison of 28 U.S.C. § 1291 ("final decisions") with 28 U.S.C. § 1292(a)(1) (interlocutory orders). Congress thus may have intended the words "final order or judgment" in the forepart of Section 209(e)(3) of the Rail Act to have a restrictive meaning. The three cases cited in the Petition in the jurisdictional statement (pages 2-3) do not address the question noted here, and we know of no legislative history which would be clearly helpful in further defining Congressional intent.



## QUESTIONS PRESENTED.

None of the questions presented are worthy of review by this Court, but the third question should be restated to read:

3. Did the Special Court, on the record before it, abuse its discretion in issuing a preliminary injunction, especially in light of 1) its prior determinations that the controversy was within its original and exclusive jurisdiction and no preclusive effect should be accorded to the proceedings before the Illinois District Court, and 2) the extraordinary powers conferred upon the Special Court by Section 209(g) of the Rail Act, 45 U.S.C. § 719(g)?

## ADDITIONAL STATUTORY PROVISIONS INVOLVED AND RELEVANT PORTIONS OF THE FINAL SYSTEM PLAN.

Since this Court's last consideration of the Rail Act (*Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974)), there have been two major series of amendments to the Act: (Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, February 5, 1976 ("Reform Act"); Rail Transportation Improvement Act of 1976, P.L. 94-555, October 19, 1976 ("Improvement Act")) and some minor ones. The amendments effected by the Improvement Act do not bear on the present controversy, nor do the several intervening minor amendments. Thus, the changes in the original Rail Act which are of relevance here are those effected by the Reform Act. In addition to the statutory provisions reprinted in Appendix A of the Petition, several additional sections of the Rail Act, as amended, are reprinted in Appendix A to this Brief in Opposition. In addition, in Appendix B, all relevant portions of the Final System Plan, as promulgated by USRA and adopted by Congress, are reprinted.



## COUNTERSTATEMENT OF THE CASE.

At the heart of the present controversy is Petitioners' dissatisfaction with that aspect of the Rail Act planning process, and its implementation, which relates to the through movement of coal traffic from the Southern Illinois coal fields to the Chicago area.

In enacting the Rail Act, Congress found that one of the reasons for the inability of the trustees of the bankrupt roads to formulate acceptable plans of reorganization was that the rail lines had "been permitted to deteriorate and now require extensive rehabilitation and modernization." Section 101(a)(2), 45 U.S.C. § 701(a)(2). Among the purposes of the Act were the identification of those parts of the rail system which would be "adequate to meet the needs and service requirements of [the] region and of the national rail transportation system", and a "reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region." Sections 101(b)(1) & (2), 45 U.S.C. §§ 701(b)(1) & (2).

In designing a final system plan, USRA was charged with preparing "an economic and operational study and analysis of" various relevant factors relating to the provision of rail services (Section 202(b)(2), 45 U.S.C. § 712(b)(2)), and to "consider methods of achieving economies in the cost of rail system operations in the region, including consolidation, pooling, and joint use or operation of lines, facilities, and operating equipment; relocation; rehabilitation and modernization of equipment, track, and other facilities; and abandonment of lines consistent with meeting needs and service requirements . . ." Section 202(b)(5), 45 U.S.C. § 712(b)(5).

In the preliminary planning process, USRA specifically studied the movement of coal traffic from Southern Illinois

to the Chicago port area. And in addition to USRA's work, extensive public hearings were held by the Rail Services Planning Office of the ICC (*See* Section 205, 45 U.S.C. § 715). In those hearings Petitioners here were given a full opportunity to present their views on the possible inclusion of various rail lines within the Final System Plan.

One of the several rail routes serving the coal traffic was a line of the Penn Central known as the Cairo Branch. But, as the Special Court noted,[1] USRA concluded that a portion of that line (some 63 miles of the Cairo Branch) was "in a terrible state of repair" and that significant sums would have to be expended to upgrade it to permit efficient handling of through traffic. In keeping with the purposes of the Rail Act, and the Congressional directive to USRA in Section 202 of the Act, 45 U.S.C. § 712, USRA determined that because of the excellent condition of the L&N route, the more efficient method of moving the coal traffic would be in part via a trackage rights arrangement between Conrail and the L&N.[2]

Thus the Final System Plan promulgated by USRA did not provide for the certification of the portion of the Cairo Branch from Lawrenceville, Illinois to Paris, Illinois, for conveyance to Conrail unless the trackage rights arrangement with the L&N could not be concluded. Rather, that portion of the line was to be subject to abandonment by the Penn Central unless a State or other eligible body chose to subsidize operations over it as a light density line. *See* Section 304, 45 U.S.C. § 744.

The Final System Plan was thereafter specifically approved by Congress in the Reform Act amendments to the

1. Slip Opinion at App. 13a-16a. The Slip Opinion of the Special Court is reprinted in and here cited to the Appendix of the Petition for Certiorari as "Slip Opinion at App. —."

2. *See* Volume I Final System Plan ("FSP") at 29-30, 334, reprinted in App. B of the Brief at pp. 1b-3b.



Rail Act.[3] But in those same amendments Congress also provided procedures for the certification by USRA of additional lines for conveyance to Conrail if, upon further study, it found that such conveyances would better "achieve the efficient implementation of the final system plan;" Section 208(d)(3)(i), 45 U.S.C. § 718(d)(3)(i). And States were separately given the right to petition USRA to make further designations prior to certifications to the Special Court if:

> ". . . such designations (A) are likely to result in improved rail service on such rail properties, and connecting rail properties, and (B) would not materially impair the profitability of [Conrail]." Section 208 (d)(2), 45 U.S.C. § 718(d)(2).

While it was a matter of dispute below whether the Conrail-L&N trackage rights agreement was timely entered into within the meaning of Section 206(d)(4) of the Rail Act, 45 U.S.C. § 716(d)(4), there is no contention that the provisions cited above did not provide Illinois with an opportunity, *after* the agreement was concluded, to seek designation of the balance of the Cairo Branch.

No additional designation was sought by any Petitioner or made by USRA, however, and the segment of the rail line in dispute was not certified for conveyance, nor, of course, was it ordered conveyed to Conrail by the Special Court. Thus, the segment of line remains the property of the Penn Central. Moreover, prior to the April 1, 1976 conveyance date, Illinois recognized that the segment would *not* be conveyed, and began negotiation of a subsidy agreement with the Department of Transportation to prevent abandonment of the line. On March 29, 1976, it then

3. Section 208(d)(1) of the Rail Act, 45 U.S.C. § 718(d)(1), was added by Section 601(e) of the Reform Act.

entered into an operating agreement with Conrail appointing Conrail as the "designated operator"[4] of the line segment in issue as a light density line which, but for this agreement, would have been abandoned.

It was only after conveyance that Petitioners launched their campaign to alter these arrangements, first through the initiation of litigation in the United States District Court for the Eastern District of Illinois, and thereafter through actions taken by Illinois before the ICC and through a demand for commercial arbitration. The thrust of Petitioners' efforts has been to seek to bar Conrail from moving through, coal train traffic over the L&N (via trackage rights) and instead, to require Conrail to initiate the through train service over the Penn Central route, now under subsidy.[5]

4. *See* Section 304(d)(1) of the Rail Act, 45 U.S.C. § 744 (d)(1).

5. Petitioners have now twice informed this Court that *Conrail* operated the freight service over the Cairo Branch prior to April 1, 1976. Petition, p. 9, and Reply Memorandum of Petitioners in Support of the Application for Stay of Injunction, p. 2. Conrail operated no trains anywhere prior to the April 1, 1976 conveyance orders of the Special Court under Section 303(b) of the Rail Act, 45 U.S.C. § 743(b).



## ARGUMENT.

The pivotal question in the litigation below is whether the controversy between the parties is one committed by Congress to the original and exclusive jurisdiction of the Special Court. The Special Court concluded that the controversy was one solely within its jurisdiction, and whether this Court should regard that determination as worthy of review (and it should not) is the dispositive issue. Neither of the other two questions presented in the Petition warrants more than brief consideration.

### I.

### Neither the Second Nor Third Question Presented in the Petition Warrants Consideration by This Court.

Had the Special Court determined that the controversy was not committed to its original and exclusive jurisdiction, then neither of the other two questions addressed by Petitioners would have arisen. There would have been no need separately to consider the effect to be given to the decision rendered by the United States District Court for the Eastern District of Illinois, nor would a preliminary injunction have issued, the principal purpose of which is to protect the Special Court's exclusive jurisdiction. Were this Court, then, to review and reverse the Special Court's jurisdictional decision, the other two questions would, as a practical matter, be moot and review by this Court would be unwarranted as advisory only.[6]

6. In addition, in its Opinion, the Special Court refrained from determining whether its jurisdiction under Section 209(b), 45 U.S.C. § 719(b), was also invoked, and whether that grant of jurisdiction was exclusive or concurrent. Hence, review and reversal by this Court of the Special Court's jurisdictional determination could require additional proceedings on remand to consider the possible effect of Section 209(b), and, assuming jurisdiction under Section

If, as we strongly urge, the Special Court properly determined its jurisdiction, the other two questions remain in the case; but they are not of a nature, nor are they framed in a manner, worthy of this Court's review.

The Special Court's conclusion not to accord preclusive effect to the decision rendered by the Illinois District Court correctly applied prior decisions by this Court. Given the statutory context reviewed at length by the Special Court (*see* App. 21a-27a), the Court rightly determined to follow *Kalb v. Feuerstein*, 308 U.S. 433 (1940); and its decision does not enlarge upon the *Kalb* exception to the general formulation of *res judicata* principles in *Stoll v. Gottlieb*, 305 U.S. 165 (1938). Put differently, the decision below provides no basis for further defining the boundary between *Kalb* and *Stoll*, even were this Court otherwise disposed in an appropriate case to readdress the subject.[7]

6. (Cont'd.)
209(b), (1) what weight should then be accorded the Illinois District Court findings (given the reorganization aspect of the Special Court's proceedings), and (2) the propriety of preliminary injunctive relief. *Cf. New Haven Inclusion Cases*, 399 U.S. 392, 428-29 (1970); *Warren v. Palmer*, 310 U.S. 132, 138-49 (1940).

7. *See also* U.S. v. U.S. Fidelity & Guaranty Co., 309 U.S. 506, 514-15 (1940); Vallely v. Northern Fire Ins. Co., 254 U.S., 348, 353-54 (1920); Williamson v. Berry, 49 U.S. (8 How.) 495, 541 (1850); Elliot v. Lessee of Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828); United States v. Ohio, 487 F.2d 936, 943 (Temp. Emerg. Ct. App. 1973) (alternative holding), *cert. denied* 421 U.S. 1014 (1975); In re Penn Central Transportation Company, 384 F. Supp. 895, 914-15 (Sp. Ct. RRRA 1974). Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940), relied on by Petitioners (but decided the same day as *Kalb, supra*), does not require a different result. There, this Court asserted the applicability of general *res judicata* principles in the absence of any indication of specific Congressional intent to exercise its bankruptcy power. Though not the only distinction, this Court has previously determined that the Rail Act is valid as legislation pursuant to that power. Regional Rail Reorganization Act Cases, 419 U.S. 102, 152-56 (1974). *See generally* Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. (Part I) 1003, (Part II) 1241 (1967).



The propriety of issuance of a preliminary injunction in the proceedings below is equally unworthy of discretionary review. Petitioners do not question the standard governing issuance of the injunction which was adopted by the Special Court (*see* Petition, at 18). Rather, with one exception, they question merely the factual support for the Special Court's conclusions or its application of those facts to the standard, hardly the type of question comprehended within the considerations set forth in Rule 19.[8] The one substantive point raised is whether Conrail is likely to prevail on the merits at the final hearing. The Special Court concluded that Conrail is likely to prevail because of its determination that the trackage rights agreement between Conrail and the L&N was timely "entered into and concluded" as a matter of federal law within the meaning of Section 206(d)(4) of the Rail Act, 45 U.S.C. § 716(d)(4).[9]

Quite apart from the correctness of the Special Court's decision as to the meaning of Section 206(d)(4) (*see* App. 28a-30a), the question is not an important question of federal law which needs to be "settled" by this Court. On the contrary, it is a narrow question, framed by the unique facts of this case, and unlikely to again arise. Its resolution here is properly entrusted to the Special Court.

8. In any case, the standard of review would be narrow, whether the court below abused its discretion. *See* Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); Brown v. Chote, 411 U.S. 452, 457 (1973). This Court has rightly not been prone to expend its resources on searching records for the adequacy of factual support for application of unchallenged legal principles.

9. Illustrative, perhaps, of the need seen by Congress for one "special court" to oversee critical litigation affecting implementation of the Final System Plan is the fact that the Illinois District Court reached its decision as to non-compliance with Section 206(d)(4) in part based upon its application of the Illinois parol evidence rule. App. 41a-42a. The Special Court saw the need for selecting a uniform federal rule of decision in construing the meaning of the Rail Act. Slip Opinion at App. 28a-29a, and n. 14.

Finally, whatever the usual standards for the issuance of a preliminary injunction, once the Special Court determined that the controversy was within its original and exclusive jurisdiction, Section 209(g) of the Rail Act, 45 U.S.C. § 719(g), provides independent and virtually conclusive support for the issuance of the injunction against further proceedings in another forum. The power granted to the Special Court in Section 209(g) to stay proceedings elsewhere in order to prevent disruption of the ongoing process of reorganization of the Northeast rail system is a strong indication of the importance attached by Congress to insuring completion of the process. But more crucial here, it is an equally strong indicator of the significance attached by Congress to the role of the Special Court in achieving the reorganization. Congress could have relied on its grant of the powers of a reorganization court to the Special Court (*see* Section 209(b), 45 U.S.C. § 719(b)) to bar disruptive litigation elsewhere, but in choosing to add the very explicit powers of Section 209(g), it left no question as to the extraordinary role (and power) it was conferring on the Special Court. There can be no question that the litigation initiated by Petitioners in the Eastern District of Illinois is, in the terms of Section 209(g), a "proceeding [that] . . . impairs the effective implementation" of the Rail Act or "interferes with the execution" of the Special Court's orders of conveyance. Section 209(g) explicitly empowers the Special Court to enjoin any such proceeding. There could thus be no conceivable abuse of discretion in the entry of the order below, particularly since it does not bar further litigation on the merits of the controversy, but merely requires that the merits be addressed by the Petitioners at the final hearing in the Special Court, not elsewhere.



## II.

## The Controversy Below Was One Within the Original and Exclusive Jurisdiction of the Special Court and no Purpose Would Be Served by Review of That Conclusion.

Admittedly, the scope of the Special Court's original and exclusive jurisdiction, if viewed in general terms, is an important question of federal law, at least insofar as insuring accomplishment of the purposes of the Rail Act is concerned. And it is equally true that this Court has not had occasion heretofore to address problems arising in connection with that jurisdictional grant. But there is utterly no reason why the specific question posed in this case "should be" addressed by this Court (*see* Rule 19). The Special Court found that it had original and exclusive jurisdiction because the controversy involved a challenge to ". . . the legality of any action of the Association, or any failure of the Association to take any action, pursuant to authority conferred or purportedly conferred under [the Rail Act]", within the meaning of Section 209(e)(1)(C), 45 U.S.C. § 719(e)(1)(C). *See* Slip Opinion at App. 16a-20a. More precisely, the Court concluded that the position of Petitioners necessarily challenged at least two failures of USRA to designate and certify for conveyance to Conrail the rail line segment in issue. Given USRA's explicit and extended treatment of the subject of how best to move coal traffic from Southern Illinois to the Chicago area, including provision for alternative designations of the Penn Central line to Conrail if the L&N trackage rights agreement was not timely "entered into and concluded" (*see* Vol. I FSP at pp. 29-30, 334; Vol. II FSP at pp. 65-69), the Special Court need not have looked beyond the Final System Plan to conclude that the matter was within its jurisdiction. But the Spe-

cial Court also took account of the additional opportunities afforded by Sections 208(d)(2) and 208(d)(3)(A), 45 U.S.C. §§ 718(d)(2) and 718(d)(3)(A), for accomplishment of the purposes of Petitioners through additional designations and certification for conveyance to Conrail by USRA, as further evidence of the implication in the controversy of failures by USRA to "take any action" within Section 209(e)(1)(C), 45 U.S.C. § 719(e)(1)(C).

Respondents firmly believe these conclusions by the Special Court were sound, but the legitimacy of the decision reached is only one reason why this Court should not invoke its discretionary power of review. The fact is that the jurisdictional question is presented in a highly individualized factual context; and the key to the conclusions reached by the Special Court lies in its application of the facts to the jurisdictional grant. Were this Court to review that application, no rule of general importance would emerge. Instead, review would entail the same examination of the treatment of the subject in the Final System Plan as the Court below undertook, and even in the unlikely event this Court were to disagree with the result reached, its decision would be limited to those facts.

To put the matter more generally, Petitioners are not contesting any general proposition such as the right of Congress to invest inferior federal courts with the "exact degrees and character [of jurisdiction] which to Congress may seem proper for the public good." That proposition was established in *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943), if not before. Instead, Petitioners seek a review of the "exact degrees and character" of the Special Court's jurisdiction as applied to their facts. In such a context, nothing would be gained by this Court's extended consideration of the issues. To affirm would at most reinforce what is already evident from the Act and its legislative history, namely, that Congress intended the Special Court to



exercise broad powers and to utilize its special expertise in insuring completion and avoiding disruption of the Congressional plan.[10] And to reverse would establish only this Court's disagreement with the Special Court that the grant of original and exclusive jurisdiction reached this particular challenge to the manner in which USRA's planning of the movement of coal trains in Illinois was implemented.

This Court is not a court which sits merely to provide an appellate forum for the correction of supposed errors, and there is even less reason to believe it should perform such a role in those cases arising under the Rail Act in which review is discretionary. If any "error" was committed below, and none was, it favored the orderly implementation of the restructuring of the Northeast railroads, the principal Congressional concern in the passage of the Act. A declination to reexamine the Special Court's decision would not disserve that national policy.

In addressing solely the question whether the writ should be granted, respondents have refrained from commenting on much of what Petitioners have written concerning the Special Court's jurisdiction and other subjects. But that silence should not be misunderstood as agreement with the Petitioners' somewhat distorted view of the legislative history and meaning of Section 209(e) of the Rail Act, 45 U.S.C. § 719(e) (*see* Petition at pp. 9-15), or with many of Petitioners' factual characterizations and refer-

10. *See* Conference Report, S. Rep. No. 595, 94th Cong., 2d Sess. 187-88 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 194-95, H.R. Rep. No. 781, 94th Cong., 2d Sess. 187-88 (1976); S. Rep. No. 499, 94th Cong., 1st Sess. 83-85 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 90-92; H.R. Rep. No. 925, 94th Cong., 1st Sess. 128 (1975). *See also* Conference Report, H.R. Rep. No. 744, 93rd Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 3320-23; S. Rep. No. 601, 93rd Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 3244; 119 Cong. Rec. S. 23780 (daily ed. December 21, 1973) (remarks of Senator Javits).

ences to the "record" below and in the Illinois District Court. A detailed rebuttal is simply unnecessary at this stage.

## CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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## APPENDIX A.

## STATUTES.

Section 101(a)(2), Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 701(a)(2):

> This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans of reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.

Section 101(b)(1), Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 701(b)(1):

> the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;

Section 101(b)(2), Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 701(b)(2):

> the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

Section 202(b)(2), Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 712(b)(2):

> prepare an economic and operational study and analysis of present and future rail and express service

needs in the region; the nature and volume of the traffic in the region now being moved by rail and express or likely to be moved by rail and express in the future; the extent to which available alternative modes of transportation could move such traffic as is now carried by railroads in reorganization; the relative economic, social, and environmental costs that would be involved in the use of such available alternative modes, including energy resource costs; and the competitive or other effects on profitable railroads.

Section 202(b)(5), Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 712(b)(5):

consider methods of achieving economies in the cost of rail system operations in the region including consolidation, pooling, and joint use or operation of lines, facilities, and operating equipment; relocation; rehabilitation and modernization of equipment, track, and other facilities; and abandonment of lines consistent with meeting needs and service requirements; together with the anticipated economic, social, and environmental costs and benefits of each such method;

Section 205, Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 715:

RAIL SERVICES PLANNING OFFICE

(a) *Establishment.*—The Rail Services Planning Office is established as an office in the Commission. The Office shall function continuously pursuant to the provisions of this Act, and shall be administered by a director.

(b) *Director.*—The Director of the Office shall be appointed for a term of 6 years by the Chairman of the Commission with the concurrence of 5 members



of the Commission. He shall be appointed and compensated, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, classification, and General Schedule pay rates, at a rate not in excess of the maximum rate for GS-18 of the General Schedule under section 5332 of such title. The Director of the Office shall administer and be responsible for the discharge of the functions and duties of the Office from the date he takes office unless removed for cause by the Commission.

(c) *Powers.*—The Director of the Office is subject to the direction of, and shall report to, such member of the Commission as the Chairman thereof shall designate. The Chairman may designate himself as that member. Such Director is authorized, with the concurrence of such member or (in case of disagreement) the Chairman of the Commission, to enter into, without regard to section 3709 of the Revised Statutes of the United States (41 U.S.C. 5) such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the functions and duties of the Office with any person (including a government entity). Each department, agency, and instrumentality of the executive branch of the Federal Government and each independent regulatory agency of the United States is authorized, and shall give careful consideration to a request, to furnish to the Director of the Office, upon written request, on a reimbursable basis or otherwise, such assistance as the Director deems necessary to carry out the functions and duties of the Office. Such assistance includes transfer of personnel with their consent and without prejudice to their position and rating.

(d) *Duties.*—In addition to its duties and responsibilities under other provisions of this Act and under the Railroad Revitalization and Regulatory Reform Act of 1976, the Office shall—

(1) assist the Commission in studying and evaluating any proposal, submitted to the Commission pursuant to section 5(2) or (3) of the Interstate Commerce Act (49 U.S.C. 5(2) or (3)), for a merger, consolidation, unification or coordination project, joint use of tracks or other facilities, or acquisition or sale of assets, which involves any common carrier by railroad subject to part I of such Act;

(2) assist the Commission in developing, with respect to economic regulation of transportation, policies which are likely to result in a more competitive, energy-efficient, and coordinated transportation system which utilizes each mode of transportation to its maximum advantage to meet the transportation service needs of the Nation;

(3) assist States and local and regional transportation agencies in making determinations whether to provide rail service continuation subsidies to maintain in operation particular rail properties, by establishing criteria for determining whether particular rail properties are suitable for rail service continuation subsidies, with such criteria to include the following considerations: rail properties are suitable if the cost of the required subsidy for such properties per year to the taxpayers is less than (A) the cost of termination of rail service over such properties measured by increased fuel consumption and



operational costs for alternative modes of transportation, (B) the cost to the gross national product in terms of reduced output of goods and services, (C) the cost of relocating or assisting through unemployment, retraining, and welfare benefits to individuals and firms adversely affected thereby, and (D) the cost to the environment measured by damage caused by increased pollution;

(4) conduct an ongoing analysis of the national rail transportation needs, evaluate the policies, plans, and programs of the Commission on the basis of such analysis, and advise the Commission of the results of such evaluation;

(5) within 180 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, issue additional regulations, after conducting a proceeding in accordance with the provisions of section 553 of title 5, United States Code, which contain—

(A) standards for the computation of subsidies for rail passenger service (except passenger service compensation disputes subject to the jurisdiction of the Commission under section 402(a) of the Rail Passenger Service Act (45 U.S.C. 562(a)), which are consistent with the compensation principles described in the final system plan and which avoid cross subsidization among commuter, intercity, and freight rail services; and

(B) standards for the determination of emergency commuter rail passenger service operating payments pursuant to section 17

of the Urban Mass Transportation Act of 1964;

(6) determine and publish, and from time to time revise and reissue, standards for determining (A) the "revenue attributable to the rail properties", (B) the "avoidable costs of providing service", (C) a "reasonable return on the value", and (D) a "reasonable management fee", as those phrases are used in section 304 of this Act, after a proceeding in accordance with the provisions of section 553 of title 5, United States Code; and

(7) employ and utilize the services of attorneys and such other personnel as may be required in order properly to protect the interests of those communities and users of rail service which, for whatever reason (such as their size or location) might not otherwise be adequately represented in the course of the reorganization process under this Act, until the assumption of such duties by the Office of Rail Public Counsel pursuant to section 26b(4)(d) of the Interstate Commerce Act (49 U.S.C. 26b(4)(d)).

(e) *Additional duties.*—

(1) Within 270 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, the Office shall issue additional regulations, after conducting a proceeding in accordance with section 553 of title 5, United States Code. Such regulations shall (A) develop an accounting system which will permit the collection and publication by the Corporation or by profitable railroads providing service over



lines scheduled for abandonment, of information necessary for an accurate determination of the attributable revenues, avoidable costs, and operations of light density lines as operating and economic units, and (B) determine the "avoidable cost of providing rail freight service", as that phrase is used in section 1a(6)(a)(ii)(A) of the Interstate Commerce Act. The Office may, at any time, revise and republish the standards and regulations required by this section to incorporate changes made necessary by the accounting system developed pursuant to this subsection.

(2) Upon the request of a State in the region, within 90 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, the Office shall prepare and publish an evaluation of the economic viability of any or all light density lines within such State which are not designated for inclusion in the final system plan. Such an evaluation shall include an analysis of the actions which may be necessary to make the operation of rail services over any such line economical. The results of each such evaluation shall be transmitted to the requesting State and published in the Federal Register, not later than 1 year after the date such request is received by the Office.

Section 303(b), Regional Rail Reorganization Act of 1973, as amended, 45 U. S. C. § 743(b):

(b) *Conveyance of rail properties.*—

(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, certificates of value is-

sued by the Association, and compensation from the profitable railroads operating in the region, States, and responsible persons, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation or any subsidiary thereof, the respective profitable railroads operating in the region, States, and responsible persons all right, title, and interest in the rail properties of such railroad in reorganization and shall itself order the conveyance of all right, title, and interest in the rail properties of any person leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 209(d) of this Act. In any case where the special court orders the trustee or trustees of a railroad in reorganization in the region to execute and deliver deeds or other instruments conveying rail properties to the Corporation or a subsidiary thereof or to a profitable railroad operating in the region or a State or responsible person, those deeds or other instruments may be executed, acknowledged, and delivered on behalf of the trustee or trustees by any person or persons who have been duly authorized to perform such acts on behalf of the trustee or trustees by the district court of the United States or any other court having jurisdiction over the respective railroad in reorganization in the region. Notwithstanding any provision of State or local law, in any case where deeds or other instruments have been executed, acknowledged, or delivered by a representative of the trustee or trustees of a railroad in reorganization in the region in accordance with the previous sentence, such execution, acknowledgment, and delivery, and the deeds or other instruments to which they pertain, shall have the same legal effect as they would have had if the trustee or trustees had themselves executed, acknowledged and delivered such deeds or other instruments.



(2) All rail properties conveyed to the Corporation or any subsidiary thereof, the respective profitable railroads operating in the region, States, and responsible persons under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided at the time of enactment of this Act for the continuance of rail passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyances shall not be restrained or enjoined by any court.

(3)(A)(i) Notwithstanding any other provision of this Act, if an interest in railroad rolling stock is included in the rail properties conveyed pursuant to subsection (b)(1) of this section, and if such conveyance is in accordance with the requirements of clause (ii) of this subparagraph, the conveyance of such properties shall be deemed an assignment. Any such assignment shall relieve the assignor of liability for any breach which occurs after the date of such conveyance, except that such assignor shall remain liable for any breach, event of default, or viola-

tion of covenant which occurred (and any charges or obligations which accrued) prior to the date of such conveyance, regardless of whether the assignee thereof assumes such liabilities, charges or obligations. If any such liabilities, charges, or obligations (accrued prior to the date of such conveyance) are paid by or on behalf of any person or entity other than such assignor, such person or entity shall have a claim to direct reimbursement, as a current expense of administration, from such assignor, together with interest on the amount so paid.

(ii) A conveyance referred to in clause (i) of this subparagraph may be effected only if—

(I) the Corporation or a subsidiary thereof, the profitable railroad operating in the region, or the State or responsible person to whom such conveyance is made assumes all of the obligations under any applicable conditional sale agreement, equipment trust agreement, or lease with respect to such rolling stock (including any obligations which accrued prior to the date on which such properties are conveyed), and

(II) such conveyance is made subject to such obligations.

As used in this subparagraph, the term "railroad rolling stock" means assets which could be carried in Interstate Commerce Commission account numbers 52, 53, 54, and 57.

(B) Subject to the provisions of this paragraph, the provisions of this Act shall not affect the title and interests of any lessor, equipment



trust trustee, or conditional sale vendor under any conditional sale agreement, equipment trust agreement, or lease under section 77(j) of the Bankruptcy Act (11 U.S.C. 205(j)). A profitable railroad operating in the region, the Corporation or a subsidiary thereof, or a State or responsible person, to whom such a conveyance is made as assignee or as lessee, shall assume all liability under such conditional sale agreement, equipment trust agreement, or lease. Such an assignment or conveyance to, and such an assumption of liability by, such a profitable railroad, Corporation, subsidiary, State, or responsible person shall not be deemed a breach, an event of default, or a violation of any covenant of any such conditional sale agreement, equipment trust agreement, or lease so assigned or conveyed, notwithstanding any provisions of any such agreement or lease.

(4) Notwithstanding anything to the contrary contained in this Act, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to the date of enactment of this Act, conveyance of such lease may only be effected if the Corporation, profitable railroad, State, or responsible person to whom the conveyance is made assumes all future liability under such lease and all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(5) Notwithstanding any covenant, undertaking, condition, or provision of any sort in any lease, agree-

ment, or contract, the conveyance, transfer, assignment, or other disposition of such lease, agreement, or contract or of any interest therein to, or the assumption by, the Corporation or any subsidiary thereof, or a profitable railroad of obligations thereunder, shall not be deemed a breach, an event of default, or a violation of any covenant of such lease, agreement, or contract.

(6) Notwithstanding anything to the contrary contained in this Act or any other provision of law, the special court shall include in its order such further directions as may be necessary to assure (A) that the operation and administration of the employee pension benefit plans described in section 505(a) of this Act shall be continued, without termination or interruption, by the Corporation until such time as the Corporation elects to amend or terminate any such plan, in whole or in part; and (B) that appropriate transfers and assignments with respect to all rights and obligations relating to such plans shall be made to the Corporation for such purposes, without prejudice to payment of consideration for whatever rights any railroad in reorganization may have in any residual assets under any such employee pension benefit plan. No court shall enter any judgment against the Corporation with respect to any such rights, except that the special court may enter such a judgment in an order issued by it pursuant to subsection (c) of this section, after taking into consideration the rights and obligations transferred pursuant to this paragraph. All liabilities as an employer shall be imposed solely upon the railroad in reorganization in the event such plan is terminated, in whole or in part, by the Corporation within 1 year after the date of such transfer or assignment (except liabilities as an employer under the Employee Retirement Income Security Act of 1974 for benefits accruing during such period), except that in any case in which the Corporation, on or after the date of transfer or assignment as provided by this paragraph, terminates in whole or in part any such plan, the benefits under which are not guaranteed under title IV of the Employee Retirement Income Security Act of 1974, the Corporation shall guarantee the payment when due of the accrued pension benefits provided for thereunder at the time of termination. The Corporation shall be entitled to a loan pursuant to section 211(h) of this Act in an amount required for the adequate funding of accrued pension benefits under all plans transferred or assigned to the Corporation in accordance with this paragraph (whether or not terminated by the Corporation). For purposes of such section 211(h) and notwithstanding any other provision of Federal or State law, amounts required for such adequate funding shall be deemed to be expenses of administration of the respective estates of the railroads in reorganization, due and payable as of the date of transfer or assignment of the plans to the Corporation.



Section 304, Regional Rail Reorganization Act of 1973, as amended, 45 U.S.C. § 744:

(a) *Discontinuance.*—

(1) Except as provided in subsections (c) and (f) of this section, rail service on rail properties of a railroad in reorganization in the region, or of a person leased, operated, or controlled by such a railroad, which transfers to the Corporation or to profitable railroads operating in the region all or substantially all of its rail properties designated for such conveyance in the final sys-

tem plan, and rail service on rail properties of a profitable railroad operating in the region which transfers substantially all of its rail properties to the Corporation or to other railroads pursuant to the final system plan, may be discontinued, to the extent such discontinuance is not precluded by the terms of the leases and agreements referred to in section 303(b)(2) of this title, if–

(A) the final system plan does not designate rail service to be operated over such rail properties;

(B) not sooner than 30 days following the effective date of the final system plan, the trustee or trustees of the applicable railroad in reorganization or a profitable railroad give notice in writing of intent to discontinue such service on a date certain which is not less than 60 days after the date of such notice or on the date of any conveyance ordered by the special court pursuant to section 303 (b)(1) of this title, whichever is later; and

(C) the notice required by subparagraph (B) of this paragraph is sent by certified mail to the Commission; to the chief executive officer, the transportation agencies, and the government of each political subdivision of each State in which such rail properties are located; and to each shipper who has used such rail service during the previous 12 months.

(2) (A) If rail properties are not, in accordance with the designations in the final system plan, required to be operated, as a consequence of a recommended arrangement for point use or operation of rail properties (under section 206(g) of this Act) or as part of a coordination project (under sections 206(c) and (g) of this Act), rail service on such properties may be discontinued, subsequent to the date of conveyance of rail properties pursuant to such section 303(b)(1), if the Commission determines that such rail service on such rail properties is not compensatory and if–



(i) the petitioner and any other railroad involved in such arrangement or coordination project have, prior to filing an application for such discontinuance, entered into a binding agreement (effective on or before the effective date of such discontinuance) to carry out such arrangement or project;

(ii) such application is filed with the Commission not later than 1 year after the effective date of the final system plan; and

(iii) such discontinuance is not precluded by the terms of the leases and agreements referred to in such section 303(b)(2).

(B) For purposes of this paragraph, rail service on rail properties is compensatory if the revenue attributable to such properties from such service equals or exceeds the sum of the avoidable costs of providing such service on such properties plus

a reasonable return on the value of such rail properties, as determined in accordance with the standards developed pursuant to section 205(d)(6) of this Act.

(C) The Commission shall make its final determination, with respect to any discontinuance requested under this paragraph, not later than 120 days after the date of filing of an application therefor. The applicant shall have the burden of proving that the service involved is not compensatory. If the Commission fails to make a final determination within such time, the application shall be deemed to be granted.

(D) The Commission may issue such rules, regulations, and procedures as it deems necessary for the conduct of its functions under this paragraph.

(b) *Abandonment.*–

(1) Except as provided in subsections (c) and (f) of this section, rail properties over which rail service has been discontinued under subsection (a) of this section may not be abandoned sooner than 120 days after the effective date of the discontinuance. Thereafter, except as provided in subsection (c) of this section, such rail properties may be abandoned upon 30 days' notice in writing to any person (including a government entity) required to receive notice under subsection (a)(1)(C) of this section.

(2) In any case in which rail properties proposed to be abandoned under this section are designated by the final system plan as rail properties which are suitable for use for other public purposes (including roads or highways, other forms of mass transportation, conservation, and recreation), such rail properties shall not be sold, leased, exchanged or otherwise disposed of during the 240-day period beginning on the date of notice of proposed abandonment under this section unless such rail properties have first been offered, upon reasonable terms, for acquisition for public purposes.



(3) Rail service may be discontinued, under subsection (a) of this section, and rail properties may be abandoned, under this section, notwithstanding any provision of the Interstate Commerce Act, the constitution or law of any State, or the decision of any court or administrative agency of the United States or of any State.

(c) *Continuance of Rail Services.*–No rail service may be discontinued and no rail properties may be abandoned, pursuant to this section–

(1) in the case of service and properties referred to in subsections (a)(1) and (b)(1) of this section, after 2 years from the effective date of the final system plan or more than 2 years after the date on which the final rail service continuation payment is received, whichever is later; or

(2) if a financially responsible person (including a government entity) offers–

(A) to provide a rail service continuation payment which is designed to cover the difference between the revenue attributable to such rail properties and the avoidable costs of providing rail service on such prop-

erties, together with a reasonable return on the value of such properties;

(B) to provide a rail service continuation payment which is payable pursuant to a lease or agreement with a State or with a local or regional transportation authority under which financial support was being provided on January 2, 1974 for the continuation of rail passenger service; or

(C) to purchase, pursuant to subsection (f) of this section, such rail properties in order to operate rail services thereon.

If a rail service continuation payment is offered, pursuant to paragraph (2)(A) of this subsection, for both freight and passenger service on the same rail properties, the owner of such properties may not be entitled to more than one payment of a reasonable return on the value of such properties.

(d) *Rail freight service.*—

(1) If a rail service continuation payment is offered, pursuant to subsection (c)(2)(A) of this section, for rail freight service, the person offering such payment shall designate the operator of such service and enter into an operating agreement with such operator. The person offering such payment shall designate as the operator of such service—

(A) the Corporation, if rail properties of the Corporation connect with the line of railroad involved, unless the Commission determines that such rail service continuation could be performed more efficiently and economically by another railroad;



(B) any other railroad whose rail properties connect with such line, if the Corporation's rail properties do not so connect or if the Commission makes a determination in accordance with subparagraph (A) of this paragraph; or

(C) any responsible person (including a government entity) which is willing to operate rail service over such rail properties.

A designated railroad may refuse to enter into such an operating agreement only if the Commission determines, on petition by any affected party, that the agreement would substantially impair such railroad's ability to serve adequately its own patrons or to meet its outstanding common carrier obligations. The designated operator shall, pursuant to each such operating agreement (i) be obligated to operate rail freight service on such rail properties, and (ii) be entitled to receive, from the person offering such payment, the difference between the revenue attributable to such properties and the avoidable costs of providing service on such rail properties, together with a reasonable management fee, as determined by the Office.

(2) The trustees of a railroad in reorganization shall permit rail service to be continued on any rail properties with respect to which a rail service continuation payment operating agreement has been entered into under this subsection. Such trustees shall receive a reasonable return on

the value of such properties, as determined in accordance with the standards developed pursuant to section 205(d)(6) of this Act.

(3) If necessary to prevent any disruption or loss of rail service, at any time after the date of conveyance, pursuant to section 303(b)(1) of this title, the Commission—

(A) shall take such action as may be appropriate under its existing authority (including the enforcement of common carrier requirements applicable to railroads in reorganization in the region) to ensure compliance with obligations imposed under this subsection; and

(B) shall have authority, in accordance with the provisions of section 1(16)(b) of the Interstate Commerce Act (49 U.S.C. 1(16)(b)), to direct rail service to be provided by any designated railroad or by the trustees of a railroad in reorganization in the region, if a rail service continuation payment has been offered but an applicable operating or lease agreement is not in effect.

For purposes of the preceding sentence, any compensation required as a result of such directed service shall be determined in accordance with the standards developed pursuant to section 205(d)(6) of this Act. The district courts of the United States shall have jurisdiction, upon petition by the Commission or any interested person (including a government entity), to enforce any order of the Commission issued pursuant to the exercise of its authority under this subsection, or



to enjoin any designated entity or the trustees of a railroad in reorganization in the region from refusing to comply with the provisions of this subsection.

(4) No determination of reasonable payment for the use of rail properties of a railroad in reorganization in the region, and no determination of value of rail properties of such a railroad (including supporting or related documents or reports of any kind) which is made in connection with any lease agreement, contract of sale, or other agreement or understanding which is entered into after the date of enactment of the Rail Transportation Improvement Act—

(A) pursuant to this section; or

(B) pursuant to section 402 of this Act or section 17 of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1613), shall be admitted as evidence, or used for any other purpose, in any civil action, or any other proceeding for damages or compensation, arising under this Act.

(e) *Rail passenger service.*—

(1) The Corporation (or a profitable railroad) shall provide rail passenger service for a period of 180 days immediately following the date of conveyance (pursuant to section 303(b)(1) of this title), with respect to any rail properties over which a railroad in reorganization in the region, or a person leased, operated, or controlled by such a railroad, was providing rail passenger service immediately prior to such date of convey-

ance. Such service shall be provided on such properties regardless of whether or not such properties are designated in the final system plan as rail properties over which rail service is required to be operated, except with respect to properties over which such service is provided by the National Railroad Passenger Corporation.

(2) If a State (or a local or regional transportation authority) was providing financial assistance to support the operation of rail passenger service, pursuant to a lease or agreement which was in effect immediately prior to the date of conveyance (pursuant to such section 303(b)(1)), the Corporation (or a profitable railroad) shall be bound by the service provisions of such lease or agreement for the duration of the 180-day mandatory operation period specified in paragraph (1) of this subsection. If a State or such an authority was providing financial assistance for the continuation of rail passenger service on rail properties immediately prior to such date of conveyance, it shall provide the same level of financial assistance during such 180-day mandatory operation period. If no such financial assistance was being provided or if no such lease or agreement was in effect immediately prior to such date of conveyance, with respect to any such rail properties, the Corporation (or a profitable railroad) shall provide the same level of rail passenger service, for the duration of such 180-day mandatory operation period, that was provided prior to such date by the applicable railroad. If—

(A) such financial assistance is not provided;



(B) a State (or a local or regional transportation authority) has not, by the end of such 180-day mandatory operation period, offered a rail service continuation payment pursuant to subsection (c)(2)(A) of this section;

(C) an applicable rail service continuation payment pursuant to such subsection (c)(2)(A) is not paid when it is due; or

(D) a payment required under a lease or agreement, pursuant to section 303(b)(2) of this title or subsection (c)(2)(B) of this section, is not paid when it is due,

the Corporation (or, where applicable, the National Railroad Passenger Corporation, a profitable railroad, or the trustee or trustees of a railroad in reorganization in the region) may (i) discontinue such rail passenger service, and (ii) with respect to rail properties not designated for inclusion in the final system plan, abandon such properties pursuant to subsections (a) and (b) of this section.

(3) Nothing in this subsection shall be construed to affect the obligation of the Corporation (or a profitable railroad), or of the trustees of the railroads in reorganization in the region, to provide rail passenger service pursuant to section 303(b)(2) of this title or subsection (c)(2)(B) of this section.

(4) If a State (or a local or regional transportation authority)—

(A) offers a rail service continuation payment, pursuant to subsection (c)(2)(A) of the section and under regulations issued by the Office pursuant to section 205(d)(5) of this Act, for the operation of rail passenger service after the 180-day mandatory operation period, and

(B) provides compensation pursuant to paragraph (2) of this subsection, for operations conducted during the 180-day mandatory operation period,

the Corporation (or a profitable railroad) shall continue to provide such service after the end of such period, except as otherwise provided in this subsection.

(5)(A) The Secretary shall reimburse the Corporation (or a profitable railroad) for any loss which is incurred by it during the 180-day mandatory operation period specified in paragraph (1) of this subsection which is not compensated for by a State (or a local or regional transportation authority). The amount of such reimbursement shall be determined pursuant to section 17(a)(1) of the Urban Mass Transportation Act of 1964 and under regulations issued by the Office pursuant to section 205(d)(5) of this Act.

(B) The Secretary shall reimburse States, local public bodies, and agencies thereof for additional costs incurred by such States, bodies, and agencies for rail service continuation payments for rail passenger service pursuant to section 17(a)(2) of the



Urban Mass Transportation Act of 1964 and under regulations issued by the Office pursuant to section 205(d)(5) of this Act.

(C) For purposes of the obligation of the Secretary to reimburse the Corporation (or a profitable railroad) or States, local public bodies, and agencies thereof under subparagraphs (A) and (B) of this paragraph, the level of rail passenger service shall be determined on the basis of train miles, car miles, or some other appropriate indicia of scheduled train movements. Programs to correct deferred maintenance on rolling stock, right-of-way, and other facilities which are designed to maintain service, meet on-time performance, and maintain a reasonable degree of passenger comfort (and costs incurred incident thereto) shall be included within the meaning of the term "loss" as used in subparagraph (A) of this paragraph and within the meaning of the term "additional costs" as used in subparagraph (B) of this paragraph and section 17(a)(2) of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1613(a)(2)).

(D) If a dispute arises with respect to the application of any such regulations, the parties to such dispute may submit such dispute to arbitration by a third party. If the parties are unable to agree upon the selection of an arbitrator, the Chairman of the Commission shall serve in that capacity (except as to matters required to be decided by the Commission, pursuant to section 402(a)

of the Rail Passenger Service Act (45 U.S.C. 562(a)).

(6) Notwithstanding any other provision of this subsection, the Corporation is not obligated to provide rail passenger service on rail properties if a State (or a local or regional transportation authority) contracts for such service to be provided on such properties by an operator other than the Corporation, except that the Corporation shall, where appropriate, provide such operator with access to such properties for such purpose.

(f) *Purchase.*—If an offer to purchase is made under subsection (c)(2)(C) of this section, such offer shall be accompanied by an offer of a rail service continuation payment. Such payment shall continue until the purchase transaction is completed, unless a railroad assumes operations over such rail properties of its own account pursuant to an order or authorization of the Commission. Whenever a railroad in reorganization in the region or a profitable railroad gives notice of intent to discontinue service pursuant to subsection (a) of this section, such railroad shall, upon the request of anyone apparently qualified to make an offer to purchase or to provide a rail service continuation payment, promptly make available its most recent reports on the physical condition of such property, together with such traffic and revenue data as would be required under subpart B of part 1121 of chapter X of title 49 of the Code of Federal Regulations and such other data as are necessary to ascertain the avoidable costs of providing service over such rail properties.



(g) *Abandonment by corporation.*—After the rail system to be operated by the Corporation or a subsidiary thereof under the final system plan has been in operation for 2 years, the Commission may authorize the Corporation or a subsidiary thereof to abandon any rail properties as to which it determines that rail service over such properties is not required by the public convenience and necessity, if the Corporation or a subsidiary thereof can demonstrate that no State (or local or regional transportation authority) is willing to offer a rail service continuation payment pursuant to subsection (c) of this section. The Commission may, at any time after the effective date of the final system plan, authorize additional rail service in the region or authorize the abandonment of rail properties which are not being operated by the Corporation or any subsidiary or affiliate thereof or by any other person. Determinations by the Commission under this subsection shall be made pursuant to applicable provisions of the Interstate Commerce Act.

(h) *Interim abandonment.*—After the date of enactment of this section and prior to the date of conveyance (pursuant to section 303(b)(1) of this title), no railroad in reorganization in the region may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless (1) it is authorized to do so by the Association, and (2) no affected State (or local or regional transportation authority) reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or the decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority.

(i) *Disposition of designated rail properties.*— No railroad in reorganization in the region and no person leased, operated or controlled by such a railroad shall sell, transfer, encumber, or otherwise dispose of rail property, or any right or interest therein, designated for transfer to the Corporation or conveyance to a profitable railroad in the final system plan, except pursuant to section 303(b) of this title. The provisions of this subsection shall not apply to any such sale, transfer, encumbrance, or other disposition—

(1) as to which the Association generally or specifically consents in writing;

(2) which, prior to enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, had been specifically approved by a United States district court having jurisdiction over the reorganization of a railroad in reorganization under section 77 of the Bankruptcy Act (11 U.S.C. 205); or

(3) following certification to the special court, pursuant to section 209(c) of the Regional Rail Reorganization Act of 1973, of any such rail properties not previously so certified.

(j) *Exemption.*—

(1)(A) Except as provided in subparagraph (B) of this paragraph, no local public body which provides mass transportation services by rail, and which is otherwise subject to the Interstate Commerce Act shall, with respect to the provision of such services, be subject to the Interstate Commerce Act or to rules,



regulations, and orders promulgated under such Act, if the interstate fares, or the ability to apply to the Interstate Commerce Commission for changes thereto, of such local public body is subject to approval or disapproval by a Governor of any State in which it provides services.

(B) Any local public body described in subparagraph (A) of this paragraph shall continue to be subject to applicable Federal laws pertaining to (i) safety, (ii) the representation of employees for purposes of collective bargaining, and (iii) employment retirement, annuity, and unemployment systems or any other provision pertaining to dealings between employees and employers.

(2) For purposes of this subsection, the term—

(A) "local public body" has the meaning prescribed for such term in section 12(c)(2) of the Urban Mass Transportation Act (49 U.S.C. 1608(c)(2)) and includes any person or entity which contracts with a local public body to provide transportation services; and

(B) "mass transportation services" means transportation services described in section 12(c)(5) of the Urban Mass Transportation Act (49 U.S.C. 1608(c)(5)) which are provided by rail.

# APPENDIX B

# FINAL SYSTEM PLAN

## RESTRUCTURING SERVICE THROUGH COORDINATION

A principal tool for improving rail efficiency, minimizing public sector funding and serving other goals of the Act is the coordination of facilities and services among railroads. The proposed coordination projects outlined in the PSP are described in some detail in Chapter 8 and its appendix (Part II). There are several projects deserving special mention because of their scope and significance for future improvements in efficiency.

In the work leading to the PSP, a critical problem was identified in the north-south lines radiating from Chicago to Southern Illinois and Indiana. These lines

provide ConRail with access to significant traffic and are necessary for the direct routing of freight. They are, however, in a terrible state of repair. Programed rehabilitation could not be achieved for a number of years because of priority needs on other lines. This fact, coupled with the existence of alternate, well-maintained routes of solvent carriers, led USRA to extensively study rerouting possibilities for points in Southern Illinois and Southern Indiana. Discussions were held with the Illinois Central Gulf (ICG), Chessie System, Chicago & Eastern Illinois (C&EI), Chicago & Western Indiana (C&WI), Milwaukee Road (CMStP&P) and the Louisville & Nashville (L&N). These discussions led to the following recommendations for route restructuring.

ConRail would route all of its Southern Illinois through traffic via Lawrenceville, Ill., thence eastward on the Chessie System (B&O) to Vincennes and then up the Louisville & Nashville/Chicago & Eastern Illinois to the Chicago area. L&N will be offered trackage rights into the Southern Illinois mines on lines designated for ConRail for the movement of south-bound coal, and USRA will support L&N's petition for these rights before the ICC. (Since this project was not approved under section 206(d)(3) as an acquisition by a solvent carrier, the project must go through normal Commission procedures).

Between Indianapolis and Chicago, ConRail will rebuild its line as far as Lafayette (as was proposed in the Preliminary System Plan) and will then obtain trackage rights over the Louisville & Nashville (formerly Monon) into the Chicago area.

In the Southern Indiana coal fields, it is proposed that Louisville & Nashville obtain trackage rights over lines being designated for ConRail between Straight Line Junction (just north of Evansville) and Oakland City and between Buckskin and Lynnville. The portion of the former proposal between Oakland City and Straight Line Junction already has been approved by the Commission in Docket 293 (Sub. No. 4). However, USRA recommends under section 206(g) that L&N be granted trackage rights over the ConRail Lynnville Branch. This will give Louisville & Nashville access to the Algiers, Winslow & Western Railway and certain on-line mines for coal movements to the south. In addition, ConRail will obtain trackage rights over the Chessie (B&O) from a point just west of Washington, Ind. to Vincennes, thence over the L&N/C&EI to Chicago. Thus, ConRail can consolidate its coal flows from Southern Illinois and Southern Indiana to the Chicago area over an existing high capacity and well maintained railroad.

There will be significant advantages to both L&N and ConRail from the recommended reroutings. The Louisville & Nashville would receive additional payments from ConRail for use of its tracks, thereby spreading the fixed ownership and the fixed portions of maintenance costs over a larger traffic base. ConRail will avoid the expenditures required to bring its presently deteriorated track (operation at 10 to 20 m.p.h.) up to a standard necessary for efficient movement of through trains. Inasmuch as these are not priority lines for ConRail rehabilitation, operating efficiency and shipper service would be improved more rapidly.

Amtrak will benefit, as its Cincinnati to Chicago service now is being detoured over the Chesapeake & Ohio and is missing the key market of Indianapolis. Without the proposed project, it would be three or more years before Amtrak service could be rerouted through Indianapolis. With the mileage required for rehabilitation sharply reduced through this coordination project, service improvement could be advanced by several years.

As a longer term project, USRA believes the Louisville & Nashville and ConRail should explore the possibilities of establishing a single high standard route between Louisville and Chicago for joint use. There are several possible alternatives. One would be to use the Penn Central from Louisville to Lafayette, thence the Monon to Chicago. Another would be to use the present Louisville & Nashville (Monon) with access to Indianapolis from Louisville over the PC line from Gosport.[11] Included in these studies should be the joint use of yards in the Louisville area—specifically, the Louisville & Nashville's rebuilt Strawberry Yard (scheduled for completion in 1977).

This is but one of the coordination opportunities identified for future implementation. It is recommended that ConRail pursue this project and other possibilities aggressively so that improvements in service will not depend totally on the speed with which it can rebuild its own lines and so that the total cost to the taxpayer can be reduced to the absolute minimum.

[11] USRA has already recommended and the ICC has made the necessary favorable determination concerning L&N trackage rights over properties designated to ConRail between Greencastle, Ind. and Indianapolis, thereby providing it with a more direct route for its traffic from Indianapolis to the South. Using the ConRail line through Martinsville would further reduce the L&N circuitry

| Transferor and interest | From— | To— | Milepost from— | Milepost to— |
|---|---|---|---|---|
| TO CONRAIL—Continued | | | | |
| Delaware & Hudson: (a) Road properties: | | | | |
| Rail lines—Trackage rights in transferor's interest in rail line from Wilkes-Barre, PA to Voorheesville, NY. From the present connection between Wilkes-Barre Connecting Railroad and the PC and the present Penn Central line between Selkirk and Syracuse. | | | | |
| Chicago & Western Indiana: (a) Road properties: | | | | |
| Rail lines—Transferor's interest in the following rail line: | | | | |
| Trackage rights | Dolton Junction, IL. | 80th St. Yard (Chicago, IL). | 16.5 | 8.7. |
| Elgin, Joliet & Eastern: (a) Road properties: | | | | |
| Rail lines—Transferor's interest in the following rail line: | | | | |
| Trackage rights | Hartsdale, IN (Joliet Branch). | Chicago Heights, IL. | 12.2 | 27.2. |
| Grand Trunk Western: (a) Road properties: | | | | |
| Rail lines—Transferor's interest in the following rail lines: | | | | |
| Trackage rights | Munster, IN | Thornton Junction, IN. | 31.5 | 25.2. |
| Trackage rights: At Battle Creek, MI | | | 175.5 | 176.9. |
| Trackage rights if offers to GTW under coordination projects GTW-6 and GTW-7 are not accepted. | Durand, MI | Saginaw, MI | 0.00 | 39.1. |
| Facilities—Transferor's interest in Detroit Terminal RR. | | | | |
| Illinois Central Gulf: (a) Road properties: | | | | |
| Rail lines—Transferor's interest in approximately 504 ft. of track from street crossing at Broadway, Pekin, IL., to switch connecting interchange track with Riverview Hatchery siding, and use of ICG Main Track. | | | | |
| Louisville & Nashville: (a) Road properties: | | | | |
| Rail lines—Transferor's interest in the following rail lines: | | | | |
| Trackage rights | Carmi, IL | Vincennes, IN (via Howell). | 360.3 | 234.6. |
| Trackage rights | Vincennes, IN | Woodland Junction, IL. | 234.6 | 82.6. |
| Trackage rights | LaFayette, IN | State Line Tower, IN. | 207.4 | 305.5. |
| Facilities—Access to and joint use and rights in transferor's interest in Strawberry Yard at Louisville, KY, at L&N Milepost 9.0. | | | | |
| Milwaukee: (a) Road properties: | | | | |
| Rail lines—Transferor's interest in the following rail lines: | | | | |
| Trackage rights | Danville, IL | Chicago, IL | 121.2 | 31.8. |
| Trackage rights | Terre Haute, IN. | Beehunter, IN | 175.1 | 218.4. |
| Trackage rights | Beehunter, IN | Elnora, IN | 218.4 | 224.0. |
| Trackage rights | Danville, IL | Terre Haute, IN. | 121.2 | 175.1. |
| Norfolk & Western: (a) Road properties: | | | | |
| Rail lines—Transferor's interest in the rail line at Indianapolis from Milepost N&W 0.79 to Milepost N&W 1.87. | | | | |
| Yards—Transferor's interest in Bison Yard, at Buffalo, NY with trackage rights reserved to N&W. | | | | |

tance of *8.6 miles*, in Madison County, Ill., a line which was recommended for inclusion on page 414 of the Preliminary System Plan, shall be offered for sale to the Illinois Central Gulf RR, a profitable railroad operating in the Region. If this offer is not accepted, the line shall be transferred to the Consolidated Rail Corp.

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## PORTION OF THE CAIRO BRANCH

### *USRA Line No. 605*

### Penn Central

This portion of the Cairo Branch, extending from *Danville* (Milepost 5.3) to *Paris, Ill.* (Milepost 37.1), a distance of *31.8 miles*, in Vermilion and Edgar Counties, Ill., a line which was recommended for inclusion on page 415 of the Preliminary System Plan, shall be transferred to the Consolidated Rail Corp.

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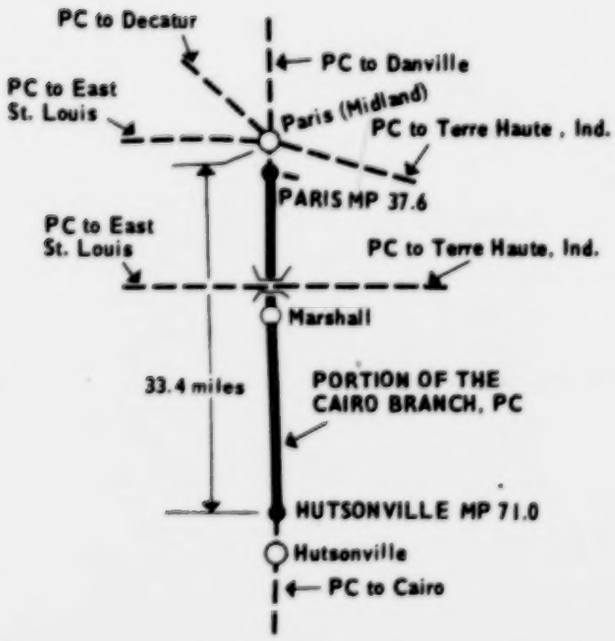
## PORTION OF THE CAIRO BRANCH

### *USRA Line No. 605a*

### Penn Central




This portion of the Cairo Branch, formerly part of the New York Central RR, extends from *Paris* (Milepost 37.6) to *Hutsonville, Ill.*, (Milepost 71.0), a distance of *33.4 miles*, in Edgar, Clark and Crawford Counties, Ill. At Paris, the line continues north to Danville and Indiana Harbor, Ind., and at Hutsonville the line continues south to Cairo (see Line Nos. 605 and 605b). Also at Paris, the line connects with the PC Peoria Secondary Track and the PC Lenox-to-Davis line to East St. Louis and Terre Haute (see Line Nos. 618 and 618a). The PC (ex-PRR) Indianapolis-St. Louis line crosses near Marshall.

#### Traffic and Operating Information

| | |
|---|---|
| Stations (with their 1973 carloads) served by this line: | |
| Oliver | 0 |
| Marshall | 4 |
| West Union | 5 |
| Total carloads generated by the line | 9 |
| Average carloads per week | 0.2 |
| Average carloads per mile | 0.3 |
| Average carloads per train | 0.5 |
| 1973 operating information: | |
| Number of round trips per year | 18 |
| Estimated time per round trip (hours) | 6 |
| Locomotive horsepower | 2,000 |
| Train crew size | 4 |

#### Public Comments on Preliminary System Plan

This segment of that portion of the Cairo Branch running from Danville south to Olmsted is one of four segments which were not included in the Plan—USRA Line Nos. 605a, 605b, 606, and part of 606a, and three segments which were included—USRA Line Nos. 605, part of 606a and 607. This fragmentation received heavy criticism. The Cairo Branch is reportedly the shortest and most direct route for Southern Illinois coal to the Chicago area and is currently a high-volume through route for that commodity.

The Brotherhood of Locomotive Engineers stated that the entire branch now meets FRA Class I track standards.

Respondents along the Branch testified that the ICG cannot meet car supply demands, rerouting would be too circuitous, and the short haul for the ICG would create no incentive for that railroad to provide cars and service needed.

Union Carbide suggested that, if the line is to be segmented, the logical break should be the PC intersection near Marshall instead of Hutsonville, leaving all of Line No. 605b and the Hutsonville to Marshall portion of Line No. 605a in to provide access for considerable traffic moving northeast from Robinson. Apparently little local traffic moves on Line No. 605a.

The United Transportation Union reported the 300 round trips per year used by USRA in the Plan is double the actual number (three per week).

The ICG does *not* believe that 605a would be a viable addition to its system, but is negotiating with USRA to develop the most efficient route for the movement of coal.

### Information for Line-Transfer Decision

| | | |
|---|---|---|
| Revenue received by PC | | $2,991 |
| Average revenue per carload | $332 | |
| Variable (avoidable) cost of continued service: | | |
| Cost incurred on the branch line | 216,576 | |
| Cost of upgrading branch line to FRA Class I: (1/10 of total upgrading cost) | 31,659 | |
| Cost incurred beyond the branch line | 1,443 | |
| Total variable (avoidable) cost | | 249,678 |
| Net contribution (loss): total | | (246,687) |
| Average per carload | | (27,410) |

This line would require upgrading to meet the requirements of the Federal Railroad Administration's minimum safety standards (Class I track, which has a maximum safe operating speed of 10 m.p.h.). Based on available information, this upgrading would include the replacement of a total of 3,573 crossties (an average of 107 crossties per mile).

The frequency of service has been reduced to reflect the rerouting of coal now moving overhead on this line.

Service to this line generated a loss of $246,687 in 1973. Recovery of this loss would require approximately a one hundred fifty-ninefold increase in traffic or an 82,476-percent rate increase.

Through coal traffic can be rerouted on a parallel L&N route.

### Disposition

If the necessary trackage rights over the L&N *cannot* be obtained, this portion of the Cairo Branch shall be transferred to Consolidated Rail Corp. If the necessary trackage rights over the L&N *are* acquired, this portion of the Cairo Branch is *not* designated for transfer to Consolidated Rail Corp. and is available for subsidy pursuant to section 304 of the Act. Public officials have recommended that certain rail rights-of-way be used for other public purposes if rail service is discontinued. For line-specific recommendations, see section C of this appendix.

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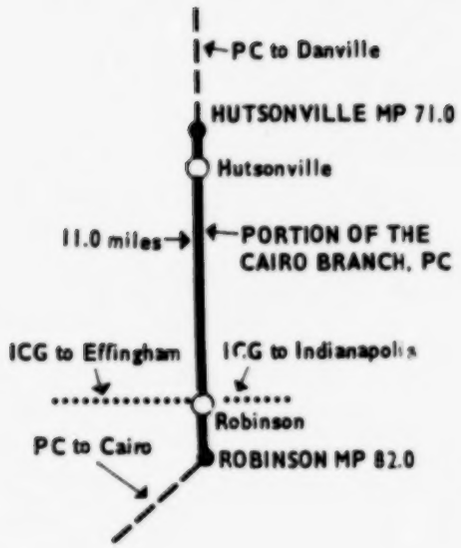
## PORTION OF THE CAIRO BRANCH

### *USRA Line No. 605b*

### Penn Central

This portion of the Cairo Branch, formerly part of the New York Central RR, extends from *Hutsonville* (Milepost 71.0) to *Robinson, Ill.* (Milepost 82.0), a distance of *11.0 miles*, in Crawford County, Ill. At Hutsonville, the line continues north to Danville (see Line No. 605a) and at Robinson, south to Cairo (see Line No. 606). A connection is made with the Illinois Central Gulf at Robinson.




### Traffic and Operating Information

| | |
|---|---|
| Stations (with their 1973 carloads) served by this line: | |
| Hutsonville | 2,146 |
| Trimble | 12 |
| Robinson | 1,554 |
| Total carloads generated by the line | 3,712 |
| Average carloads per week | 71.4 |
| Average carloads per mile | 337.4 |
| Average carloads per train | 12.4 |
| 1973 operating information: | |
| Number of round trips per year | 300 |
| Estimated time per round trip (hours) | 5.0 |
| Locomotive horsepower | 4,000 |
| Train crew size | 4 |

### Public Comments on Preliminary System Plan

See comments on USRA Line No. 605a.

Union Carbide pointed out a significant error in USRA's carload data for Robinson—stating that Union Carbide and Marathon Oil shipped a total of 1,487 carloads north on this line in 1973.

The Central Illinois Public Service Co. operates a coal-fired 218,000 kilowatt power plant at Hutsonville, which will use over 3,000 carloads of coal in 1975.

Loss of rail service would seriously impair the ability of Central Illinois Power to serve its 760,000 electricity consuming customers.

Peabody Coal Co. plans to ship 100,000 tons of coal in 1975 from its Will Scarlet Mine at Stonefort north on the Cairo Branch to Hutsonville.

The ICG believes that Line No. 605b/606/606a would be a viable addition to its system and is interested in acquisition pending the outcome of negotiations with USRA.

The Federal Power Commission points out the importance of this line and lines 606 and 606a to the 200 megawatt electric power generating plant at Hutsonville, which receives about 200,000 tons of coal per year by rail.

### Information for Line-Transfer Decision

| | | |
|---|---|---|
| Revenue received by PC | | $824,083 |
| Average revenue per carload | $222 | |
| Variable (avoidable) cost of continued service: | | |
| Cost incurred on the branch line | 219,757 | |
| Cost of upgrading branch line to FRA Class I: (1/10 of total upgrading cost) | 11,382 | |
| Cost incurred beyond the branch line | 719,394 | |
| Total variable (avoidable) cost | | 950,533 |
| Net contribution (loss): total | | (126,500) |
| Average per carload | (34) | |

This line would require upgrading to meet the requirements of the Federal Railroad Administration's minimum safety standards (Class I track, which has a maximum safe operating speed of 10 m.p.h.). Based on available information, this upgrading would include the replacement of a total of 1,175 crossties (an average of 115 crossties per mile).

This line was reanalyzed and all Robinson traffic was assigned to this segment.

Service to this line generated a loss of $126,500 in 1973. Recovery of this loss would require approximately a 121 percent increase in traffic or a 15 percent rate increase.

Through coal traffic will be routed over ConRail to Lawrenceville, via the Chessie System to Vincennes, thence north via the L&N.

Approximately 50 percent of the coal shipped to Hutsonville is handled by motor carrier and, according to available information, all of the inbound coal can economically be handled by truck.

### Disposition

If the necessary trackage rights over the L&N *cannot* be obtained, this portion of the Cairo Branch shall be transferred to the Consolidated Rail Corp. If the necessary trackage rights over the L&N *are* acquired, this portion of the Cairo Branch shall be offered for sale to the Illinois Central Gulf RR, a profitable railroad operating in the Region. This sale would preserve rail service to 3,712 carloads or 100 percent of the traffic generated on this line. If this offer is not accepted, the line is *not* designated for transfer to Consolidated Rail Corp. and is available for subsidy pursuant to section 304 of the Act. Public officials have recommended that certain rail rights-of-way be used for other public purposes if rail service is discontinued. For line-specific recommendations, see section C of this appendix.

## PORTION OF CAIRO BRANCH

## *USRA Line No. 606*

## Penn Central

This portion of the Cairo Branch, formerly part of the New York Central RR, extends from *Robinson* (Milepost 82.0) to *Mount Carmel, Ill.* (Milepost 126.3), a distance of *44.3 miles*, in Crawford, Lawrence and Wabash Counties, Ill. At Robinson, this line continues north to Danville and, at Mount Carmel, south to Cairo (see Line Nos. 605b and 606a). Other connections are: the Illinois Central Gulf RR at Robinson; the Baltimore & Ohio RR at Lawrenceville; the Southern Ry. at Mount Carmel, and the PC Evansville Secondary Track at Mount Carmel (see Line No. 612).

### Traffic and Operating Information

| | |
|---|---|
| Stations (with their 1973 carloads) served by this line: | |
| Flat Rock | 112 |
| Pinkstaff | 16 |
| Lawrenceville | 277 |
| St. Francisville | 4 |
| Allendale | 41 |
| Mount Carmel[1] | 572 |
| Total carloads generated by the line | 1,022 |
| Average carloads per week | 19.7 |
| Average carloads per mile | 23.1 |
| Average carloads per train | 6.8 |
| 1973 operating information: | |
| Number of round trips per year | 150 |
| Estimated time per round trip (hours) | 10.0 |
| Locomotive horsepower | 4,000 |
| Train crew size | 4 |

[1] Includes only traffic on segment.

### Public Comments on Preliminary System Plan

See comments on USRA line No. 605a.

Pacific Press & Shear Co., stated its need for rail service at its Mount Carmel plant. Pacific's inbound traffic is 4,000 tons of steel plate per year instead of the 2,700 tons indicated in the Plan.

The Mayor of Mount Carmel estimated a daily traffic potential of 200,000 tons outbound and 100,000 tons inbound of agricultural products, coal, etc.

Chessie would continue to provide rail service to *Lawrenceville shippers only*, who would otherwise be without service if 606 were abandoned.

### Information for Line-Transfer Decision

| | | |
|---|---|---|
| Revenue received by PC | | $280,641 |
| Average revenue per carload | $275 | |
| Variable (avoidable) cost of continued service: | | |
| Cost incurred on the branch line | 438,462 | |
| Cost of upgrading branch line to FRA Class I: (1/10 of total upgrading cost) | 44,366 | |
| Cost incurred beyond the branch line | 183,589 | |
| Total variable (avoidable) cost | | 666,417 |
| Net contribution (loss): total | | (385,776) |
| Average per carload | (377) | |

This line will require upgrading to meet the requirements of the Federal Railroad Administration's minimum safety standards. Based on available information, this upgrading would include the replacement of a total of 2,284 crossties.

Traffic at Robinson was assigned to Line No. 605b.

ConRail will move coal traffic between the southern Illinois coal fields and northern markets by using part of Line 606 as a through route. ConRail trains will move east on the B&O between Lawrenceville, Ill. and Vincennes, Ind., and north to Chicago on L&N trackage rights.

### Disposition

The portion of the Cairo Branch from Milepost 126.3 to Milepost 101.0 shall be transferred to the Consolidated Rail Corp.

If the necessary trackage rights over the L&N *cannot* be obtained, the portion of the Cairo Branch from Milepost 82.0 to Milepost 101.0 shall be transferred to the Consolidated Rail Corp. If the necessary trackage rights over the L&N are acquired, the portion of the Cairo Branch from Milepost 82.0 to Milepost 101.0 is *not* designated for transfer to Consolidated Rail Corp. and is available for subsidy pursuant to section 304 of the Act. Public officials have recommended that certain rail rights-of-way be used for other public purposes if rail service is discontinued. For line-specific recommendations, see section C of this appendix.

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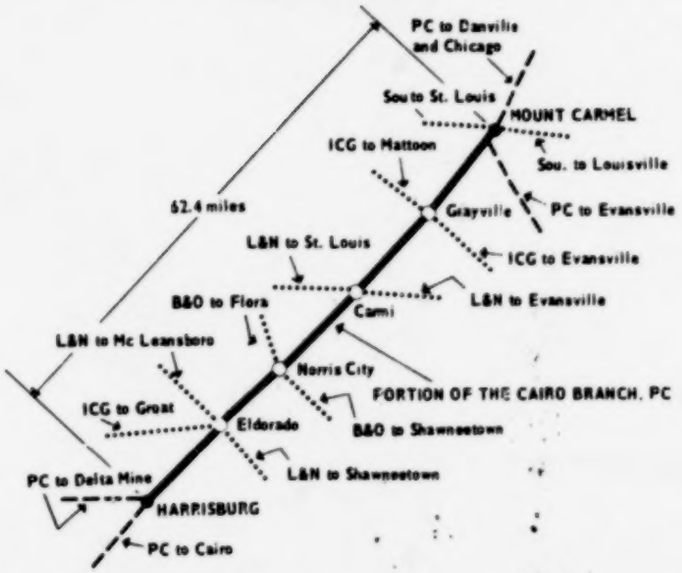
## PORTION OF THE CAIRO BRANCH

### *USRA Line No. 606a*

### Penn Central




This portion of the Cairo Branch, formerly part of the New York Central RR, extends from *Mount Carmel* (Milepost 126.3), to *Harrisburg, Ill.* (Milepost 188.7), a distance of *62.4 miles*, in Wabash, Edwards, White, Gallatin and Saline Counties. Ill. At Mount Carmel, this line continues north to Danville, and at Harrisburg south to Cairo (see Line Nos. 606 and 607). In addition, the line connects with the Southern Ry St. Louis-Louisville line at Mount Carmel, the Illinois Central Gulf to Mattoon and Evansville at Grayville, the Louisville & Nashville at Carmi and Eldorado, the Baltimore & Ohio Shawneetown Branch at Norris City, the PC Saline Valley Branch at Harrisburg, and the PC Evansville Secondary Track at Mount Carmel (see Line Nos. 607b and 612). Another connection is made with the Illinois Central Gulf at Eldorado.

### Traffic and Operating Information

| Stations (with their 1973 carloads) served by this line: | |
|---|---|
| Keensburg | 67 |
| Grayville | 131 |
| Crossville | 66 |
| Carmi | 151 |
| Norris City | 1 |
| Eldorado | 1,839 |
| Mount Carmel [1] | 135 |
| Total carloads generated by the line | 2,390 |
| Average carloads per week | 46.0 |
| Average carloads per mile | 38.3 |

See footnote at end of table.

| | |
|---|---|
| Average carloads per train | 8.0 |
| 1973 operating information: | |
| Number of round trips per year | 300 |
| Estimated time per round trip (hours) | 12 |
| Locomotive horsepower | 4,000 |
| Train crew size | 4 |

[1] Includes only traffic on this segment.

#### Public Comments on Preliminary System Plan

See comments on USRA Line No. 605a.

Respondents considered as confusing and ambiguous the USRA recommendation that Line No. 606a not be included in ConRail except between Mount Carmel and Eldorado, but that segment would be operated only if shippers were unable to reroute coal traffic.

Public Service Co. and Amax Coal Co. were particularly concerned because Amax projects the shipment of 3 to 6 million tons of coal per year from their Wabash mine near Keensburg to Public Service's Gibson Station at Skelton. It is only 6 miles from Keensburg to Mount Carmel and there is no reasonable alternative routing.

The Sahara Coal Co. operates three mines on the Saline Valley Branch (USRA Line No. 607b) west of Harrisburg. Sahara shipped over 1.9 million tons of coal in 1974, 61 percent on the PC and 39 percent on the ICG. Sahara says the ICG is perpetually short of cars and unable to meet present demand. The company would have to close two of its mines, laying off nearly 400 workers, if it lost access to the PC.

At Eldorado, the Federal Wholesale Division of Scot Lad Foods, Inc., is located on the PC siding. It receives 2,300 cars per year. According to Federal, neither the ICG nor the L&N have the facilities in Eldorado to handle Federal's traffic.

Other shippers and receivers included Warren Petroleum Co. (1974–90 cars) and Halliburton Services (1974–11 cars) in Crossville, Illinois.

#### Information for Line-Transfer Decision

| | | |
|---|---|---|
| Revenue received by PC | | $469,003 |
| Average revenue per carload | $196 | |
| Variable (avoidable) cost of continued service: | | |
| Cost incurred on the branch line | 739,285 | |
| Cost of upgrading branch line to FRA Class I: (1/10 of total upgrading cost) | 62,689 | |
| Cost incurred beyond the branch line | 351,406 | |
| Total variable (avoidable) cost | | 1,153,380 |
| Net contribution (loss): total | | (684,377) |
| Average per carload | (286) | |

This line would require upgrading to meet the requirements of the Federal Railroad Administration's minimum safety standards (Class I track, which has a maximum safe operating speed of 10 m.p.h.). Based on available information, this upgrading would include the replacement of a total of 5,600 crossties (an average of 90 crossties per mile).

A review of this line indicated it is required for the northbound movement of coal.

#### Disposition

This portion of the Cairo Branch shall be transferred to the Consolidated Rail Corp.

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## PORTION OF THE CAIRO BRANCH

### *USRA Line No. 607*

### Penn Central

This portion of the Cairo Branch, extending from *Harrisburg* (Milepost 188.7) to *Olmsted, Ill.* (Milepost 245.3), a distance of *56.6 miles*, in Saline, Massac, Johnson, Williamson and Pulaski Counties, Ill., a line which was recommended for inclusion on page 419 of the Preliminary System Plan, shall be transferred to the Consolidated Rail Corp.

It is recommended that the portion of this line from Milepost 235.2 (Karnak) to Milepost 245.3 (Olmsted) be sold to the Burlington Northern (see section 206(g) of the Act).

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## SALINE VALLEY BRANCH

### *USRA Line No. 607b*

### Penn Central

The Saline Valley Branch, extending from *Harrisburg* (Milepost 0.0) to *Delta Mine, Ill.* (Milepost 10.7), a distance of *10.7 miles*, in Saline County, Ill., a line which was recommended for inclusion on page 420 of the Preliminary System Plan, shall be transferred to the Consolidated Rail Corp.

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## PORTION OF PEORIA SECONDARY TRACK

### *USRA Line No. 609*

### Penn Central

This portion of the Peoria Secondary Track, formerly part of the Pennsylvania RR, extends from *Paris* (Milepost 22.5) to *Decatur, Ill.* (Milepost 95.5), a distance of *73.0 miles*, in Edgar, Coles, Douglas, Moultrie

Supreme Court, U. S.
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No. 76-841

In the

# Supreme Court of the United States

OCTOBER TERM, 1976

STATE OF ILLINOIS;
Clark County, Illinois;
Crawford County, Illinois;
Lawrence County, Illinois;
Wabash County, Illinois;
City of Robinson, Illinois;
City of Mount Carmel, Illinois;
Greater Wabash Regional
Planning Commission,
*Petitioners,*

v.

CONSOLIDATED RAIL CORPORATION,
*Respondent.*

## PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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# INDEX


PAGE

ARGUMENT ..... 2

I. The Special Court Exceeded the Carefully Defined Limits of Its Jurisdiction ..... 2

II. The District Court Decision Was Entitled to *Res Judicata* Effect in the Special Court ..... 4

III. The Special Court Improperly Applied the Standards for a Preliminary Injunction ..... 5

CONCLUSION ..... 7


CITATIONS

CASES:


*Durfee* v. *Duke*, 375 U.S. 106 (1963) ..... 4

*Kalb* v. *Feuerstein*, 308 U.S. 433 (1940) ..... 4

*Stoll* v. *Gottlieb*, 305 U.S. 165 (1938) ..... 5

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---

# PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners (hereinafter the "State of Illinois") submit the following reply to ConRail's Brief in Opposition to Petition for Writ of Certiorari (hereinafter "Br. Opp.").

## ARGUMENT

### I. The Special Court Exceeded the Carefully Defined Limits of Its Jurisdiction.

ConRail contends that this issue is not sufficiently important to merit this Court's attention since it is presented in "a highly individualized factual context." (Br. Opp. 14) The decision of the Special Court, however, rests on its broad reading and application of the statute conferring jurisdiction upon it. As such, it will serve in the future as the basic precedent and standard for the Special Court's jurisdiction in all cases in which its jurisdiction is disputed.

There will undoubtedly be many such cases since the view of the Special Court and ConRail is that any case dealing with a matter given "explicit and extended treatment" by the United States Railway Association (USRA) in the Final System Plan constitutes a case within the Special Court's jurisdiction over challenges to the legality of any action taken, or any failure to take appropriate action, by the USRA. (Br. Opp. 13) Such a reading of the statute effectively repeals the carefully defined limits placed on the Special Court's jurisdiction by Congress. (See Petition at pp. 9-11.)

Another factor which makes this case worthy of full review by this Court — and one completely ignored by ConRail — is the usurpation by the Special Court of the authority of the Interstate Commerce Commission (ICC) as well as the express jurisdiction of the federal courts. ConRail cannot deny that if the Special Court had refused to exercise jurisdiction in this case and the District Court



decision had been upheld on appeal, then the Louisville & Nashville (L & N) trackage could not have been used by ConRail until ICC approval was secured. Thus, ConRail's argument that any error in the Special Court decision is tolerable since it would be consistent with the general purpose of Congress, cannot be accepted. The Rail Acts exempt a transfer of operating rights from ICC review only if all required steps under those Acts were taken. Since ConRail failed to meet all those requirements, it would have to present its case to the expert agency overseeing railroad operations before undertaking use of the L & N trackage.

ConRail argues now that the State of Illinois somehow failed to take appropriate action. According to ConRail, the State of Illinois should have sought a designation of the excluded portion of the Cairo Branch after the execution of the ConRail-L & N trackage agreement. ConRail's position conflicts, however, with its other argument that the State of Illinois has implicitly challenged the failure of the USRA to make such a designation.

Quite apart from that inconsistency, ConRail's argument is a transparent attempt to shift the Court's focus from its failure to satisfy the requirements of the Rail Acts. Nothing in those Acts required the State of Illinois to seek such action from the USRA, and any such attempt would have collided with ConRail's claim that the ConRail-L & N agreement met all the requirements of the Rail Acts. Instead, the State of Illinois took the appropriate course of challenging ConRail's contention in federal court. If successful, the State of Illinois would have contested any subsequent ConRail effort to obtain ICC approval. If the ICC did not give its approval, ConRail

would have been precluded from using the L & N trackage by the expert agency charged with responsibility for such decisions.

## II. The District Court Decision Was Entitled to Res Judicata Effect in the Special Court.

ConRail's argument with respect to the *res judicata* effect of the United States District Court decision is the conclusory statement that *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), controls the question, as the Special Court decided. ConRail makes no attempt, however, to discuss *Kalb* on its facts and to demonstrate how this case fits within its holding.

*Kalb* is clearly distinguishable. In that case, this Court found that the statute in question was "self-executing" in barring any courts except the bankruptcy courts from exercising jurisdiction over farmer-debtors and their property. The exclusive jurisdiction conferred upon the bankruptcy courts was complete and without exception over the subject matter involved. Moreover, in *Kalb* the jurisdictional issue had not been fully litigated in the first forum. 308 U.S. at 439-441, 443. *See Durfee* v. *Duke*, 375 U.S. 106, 114 n.12 (1963). Here the District Court made a decision on its jurisdiction after extensive briefing and argument.

In contrast to the statute in *Kalb*, the Rail Acts carefully limit the Special Court's jurisdiction to specific categories of cases, and there is no provision in those Acts which can be viewed as a "self-executing" exclusion of action by other courts in all cases involving the transfer or operations of railroad property under the Rail Acts.



Since *Kalb* does not apply to this case, the principles of *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938), control and require reversal of the Special Court decision:

> "When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res judicata. After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation." *Id.*, at 172 (footnotes omitted).

The Special Court's clear violation of the settled law of *res judicata* requires corrective action by this Court either through plenary review together with the jurisdictional issue or by summary reversal.

## III. The Special Court Improperly Applied the Standards for a Preliminary Injunction.

ConRail relies primarily upon Section 209(g) of the 1973 Rail Act, as amended by Section 602(b) of the 1976 Rail Act, in defending the injunctive relief granted by the Special Court. That section, however, was clearly designed for emergency situations in which immediate Special Court action was required to protect the reorganization process. Here ConRail fully contested the issues, first in the District Court and then on appeal,

before seeking Special Court action under Section 209(g). ConRail's five-month delay in seeking a Special Court stay of proceedings in the District Court and Court of Appeals demonstrates the implausibility of ConRail's contention that such relief is necessary to avoid the impairment of the effective implementation of the Rail Acts, which is the standard for relief under Section 209(g).

ConRail makes no attempt to justify or explain the Special Court's decision as to the timeliness of the ConRail-L & N agreement under the Rail Acts. Admittedly, such a defense would be difficult given ConRail's inconsistent position on the question in the Special Court and the completely unconvincing nature of the Special Court's decision.

Quite apart from the other errors made by that Court in issuing the relief,* its decision on the timeliness point itself justifies summary reversal by this Court. While this Court does not generally expend its time in reviewing lower court decisions for abuse of discretion, the Special Court's unjustified assertion of authority can be reviewed only by this Court.

* See Petition at pp. 18-22.



## CONCLUSION

The petition for a writ of certiorari should be granted.

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